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In the Supreme Court of the United States

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OCTOBER TERM, 1951

NO. 350

JOSEPH MOGIS,

Petitioner,

vs.

LYMAN RICHEY SAND & GRAVEL CORPORATION, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

EDGAR VIBERT,
SWANSON, VIBERT & TURNER,
Attorneys for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

NO. .....

JOSEPH MOGIS,

Petitioner,

vs.

LYMAN RICHEY SAND & GRAVEL CORPORATION, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To The Honorable Supreme Court of the United States:

The petition of Joseph Mogis respectfully prays for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the decision of the

said court, affirming the order of the United States District Court for the District of Nebraska, dismissing the petitioner's cause of action.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

The petitioner for himself and as assignee of eight others filed this action on September 15, 1949 (R. 1). The petition alleged that the Petitioner and his assignors were dump truck operators licensed as common carriers by the Nebraska Railway Commission; that as common carriers they had hauled sand, gravel and crushed rock for the defendant from September 15, 1945, to April 5, 1949, and that during this period the respondent had paid for said services amounts less than the legal rates established by the Nebraska Railway Commission. The petitioner further alleged that these undercharges constituted rebates within the meaning of Section 59-817, R. S. 1943, and accordingly prayed for triple damages totaling $138,000.00, together with costs of suit, including a reasonable attorney's fee.

After the matter had been brought to issue and the petitioner had filed written interrogatories, the respondent raised the issue of the validity of the tariff schedule covering motor vehicles promulgated by the Nebraska Railway Commission. It was respondent's contention (R. 10) that this tariff schedule was invalid for the reason that it had not been filed with the Secretary of State under the provisions of Section 84-902, R. R. S. Nebr. 1943. This section forming a part of the Nebraska Filing

Act was enacted in 1945 on the recommendation of the Nebraska Bar Association. Both the report and the act are set out in full in the appendix to this petition. The act provided that each administrative agency must file all "rules" then in force and to be issued with the Secretary of State. A "rule" was defined to mean, "The written statement of any rule, regulation, standard or policy of general application issued by an agency."

It was petitioner's contention that tariff schedules were never intended to be covered by the Nebraska Filing Statute; that the Nebraska Attorney General, in a written opinion, has specifically ruled that the tariff schedules were not covered by the Filing Act (Ap. 36-44) and that the Nebraska Railway Commission had adopted this interpretation of the Act. It was further the contention of the petitioner that subsequent to the adoption of this interpretation by the Attorney General and the Nebraska Railway Commission, the Nebraska Legislature had amended and re-enacted the applicable provisions of the Act without changing the definition of "rule," (Ap. 44-53) thus implying its approval of this administrative interpretation at a time when, had the interpretation been wrong, vast property interests in Nebraska would have been endangered by the adoption of invalid rates by the Railway Commission. Both parties agreed that no tariff schedules issued by the Nebraska Railway Commission had ever been filed with the Secretary of State (R. 12).

The issue was submitted to the District Court and that court rendered its opinion that the tariff schedule for motor vehicles issued by the Nebraska Railway Commission was invalid on the ground that such a tariff

schedule was a "rule" within the meaning of the filing act and should have been filed with the Nebraska Secretary of State (R. 12). Upon appeal to the Court of Appeals for the Eighth Circuit, this order was affirmed by a divided court (R. 33). The Court of Appeals likewise declined to stay the proceedings until an authoritative ruling on the question could be obtained from the Nebraska Court (R. 32), but in overruling petitioner's petition for a rehearing, the Court of Appeals expressed its regret that it could not see its way clear to suspend or stay its decision pending such an authoritative ruling (R. 95).

JURISDICTION

The court has jurisdiction to review the decision of the Court of Appeals for the Eighth Circuit by writ of certiorari under the provisions of Section 1254(1), Judicial Code (28 U. S. C. 1254(1)).

THE OPINION

The opinion of the Court of Appeals for the Eighth Circuit which petitioner seeks to have reviewed is *Joseph Mogis, Appellant, v. Lyman-Richey Sand & Gravel Corporation, a corporation, Appellee,* Civil No. 14,182, 189 F. (2) 130 (R. 33), 190 F. (2) 202 (R. 95) (rehearing denied). The memorandum opinion of the District Court which was affirmed by the Court of Appeals will be found at 90 F. S. 251 (R. 12).

QUESTIONS PRESENTED

Petitioner desires to present three questions to the Court:

(1) Are the tariff schedules of the Nebraska Railway Commission and the rates set forth therein "rules" within the meaning of the Nebraska Filing Act, so as to require the filing of said tariff schedules with the Secretary of State?

(2) Should the construction of the Nebraska Filing Act by the Nebraska Attorney General, adopted by the Nebraska Railway Commission, and confirmed by implication by the Nebraska Legislature, be accepted as controlling by the United States District Court and the United States Court of Appeals?

(3) Should the United States Court of Appeals have remanded the case to the United States District Court with instructions to retain jurisdiction for a reasonable time to permit the parties to obtain authoritative ruling on the validity of the rates involved or should the Court of Appeals for the Eighth Circuit have stayed the proceedings in some other appropriate way pending the rendition of such an authoritative ruling?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The petitioner relies on the following four reasons for the issuance of the writ:

(1) In holding that the word "rule" as used in the Nebraska Filing Act encompassed rates promulgated

by the Nebraska Railway Commission, the Court of Appeals for the Eighth Circuit has decided an important question of Nebraska law in a way conflicting with applicable Nebraska rulings.

(2) In declining to follow an established administrative interpretation of a Nebraska statute based on an opinion of the Nebraska Attorney General and confirmed by the re-enactment of the applicable provisions of the act by the Nebraska Legislature with the effect that all rates promulgated by the Nebraska Railway Commission prior to August 27, 1951, are placed under a cloud of suspicion, the Court of Appeals for the Eighth Circuit has so far sanctioned a departure by the United States District Court for the District of Nebraska from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

(3) In failing to remand the case to the United States District Court with instructions to retain jurisdiction for sufficient time to permit the parties to obtain an authoritative ruling by the Nebraska courts on the validity of the rates involved and in refusing to stay the proceedings in some other acceptable manner, the Court of Appeals for the Eighth Circuit has decided a federal question in a way probably in conflict with the applicable decisions of this Court.

(4) In refusing to remand this case to the District Court or to stay its decision awaiting the rendition of an authoritative ruling on the validity of the rates by the Nebraska courts, the Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the decisions of the Court of Appeals for the Seventh Circuit.

CONCLUSION

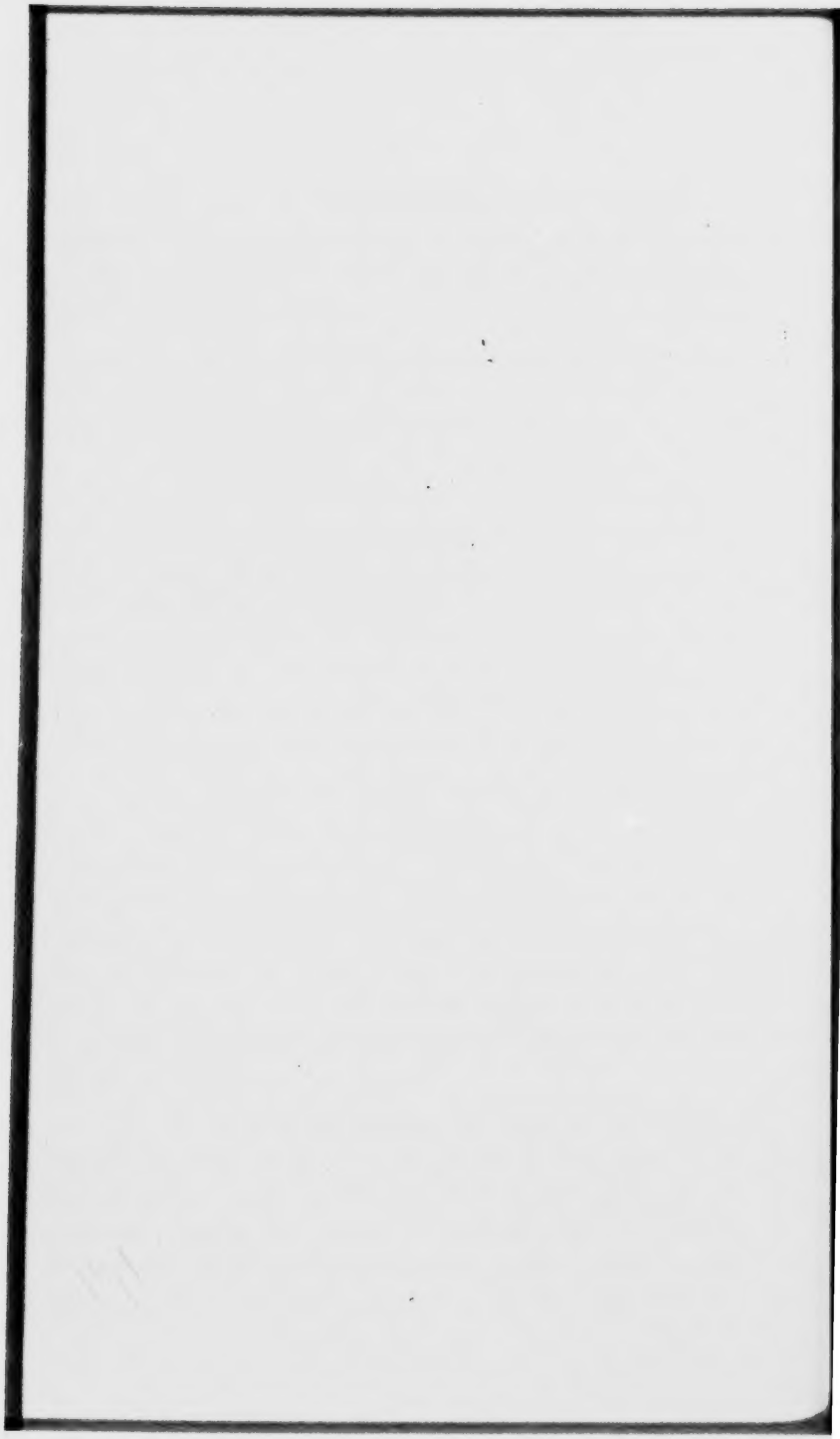
For the foregoing reasons, petitioner respectfully prays that this petition for writ of certiorari should be granted.

Dated September 22, 1951.

Respectfully submitted,

Einar Viren

EINAR VIREN,
SWENSON, VIREN & TURNER,
Attorneys for Petitioner.



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JOSEPH MOGIS,

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LYMAN RICHEY SAND & GRAVEL CORPORATION, a corporation,

Respondent.

—————o—————

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, Joseph Mogis, Appellant, v. Lyman-Richey Sand & Gravel Corporation, a corporation, Appellee, Civil No. 14,182, is reported at 189 F. (2d) 130 (R. 33), 190 F. (2d) 202 (R. 95) (rehearing denied). The memorandum opinion of the United States District Court in Joseph Mogis, Plaintiff, vs. Lyman Richey Sand & Gravel Corporation, a corporation, Defendant, is reported at 90 F. Supp. 251 (R. 12).

JURISDICTIONAL STATEMENT

The Court has jurisdiction to review the decision of the Court of Appeals for the Eighth Circuit by writ of certiorari under the provisions of Section 1254(1) Judicial Code (28 U. S. C. 1254(1)).

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STATEMENT OF THE CASE

This is an action for undercharges based on the contention of the petitioner that respondent paid less than the established rates for services rendered by the petitioner and his eight assignors as dump truck operators hauling sand, gravel and crushed rock for the respondent during the period between September 15, 1945, and April 5, 1949. The petitioner contends that these undercharges constitute rebates under the provisions of Section 59-817, R. R. S. Nebr. 1943, and has asked for triple damages totaling $138,000.00 together with costs of the suit including a reasonable attorney's fee. Petitioner's cause of action was dismissed by the United States District Court for the District of Nebraska on the ground that the rates established by the Nebraska Railway Commission were invalid because the Railway Commission failed to file them with the Secretary of State. The Nebraska Filing Act (Sections 84-901 to 906, incl., R. R. S. Neb. 1943) requires all "rules" issued by Nebraska administrative agencies to be filed with the Secretary of State. It is the contention of the petitioner that the Nebraska Filing Act was never meant to and does not affect the tariff schedules promulgated by the Nebraska Railway Commission. A short history of the Nebraska Filing Statute is necessary to disclose the purposes and intent of the act.

The applicable statutes, reports, and legislative history are set out in the appendix to this Petition and Brief and will be referred to here by the sign (Ap. .....).

In 1944 Special Committee on Administrative Agencies and Tribunals of the Nebraska Bar Association recommended legislation to cure what it felt to be a flaw in Nebraska administrative procedure (Ap. 1-18). The committee was concerned with the unavailability of rules and regulations of general application being issued by Nebraska administrative agencies. Influenced by the usefulness of the Federal Register, the committee recommended to the Legislature that all rules and regulations of such agencies be filed with the Nebraska Secretary of State. The committee cited as an example of unavailability of regulations the rules of practice before the Nebraska Railway Commission and the general orders issued by the Commission under which public utilities and common carriers not the subject of specific legislation or federal control are regulated in Nebraska. These general orders are distinct from and to be contrasted with the tariff schedules promulgated by the Nebraska Railway Commission under which the *rates* for services by public utilities and common carriers are established whether the utility is regulated by a specific act of the Legislature or by the general orders above referred to. As contrasted with the general orders, the tariff schedules must be published under specific statutory command. The statute covering the issuance of the motor vehicle tariff schedules is Sec. 75-303, R. R. S. Nebr. 1943. The failure to distinguish between the general orders and tariff schedules of the Railway Commission has caused some confusion in the

decisions bearing upon the applicability of the Nebraska Filing Act to the rates involved in this case.

Pursuant to the recommendation of the Bar Association Committee, the Nebraska Legislature in 1945 enacted L. B. 138 which appears as Sections 84-901 to 84-906, inclusive, R. R. S. Nebr. 1943, referred to hereafter as the Nebraska Filing Act. This act provides in substance that to be valid, all "rules" of Nebraska administrative agencies must be filed with the Nebraska Secretary of State. It defined "rules" as "any rule, regulation, standard or policy of general application." The statute contains no direct reference to rates or tariff schedules (Ap. 23-25).

Shortly after the passage of the filing statute, the Nebraska Railway Commission turned to the Nebraska Attorney General for advice as to whether the tariff schedules published by the Commission were to be filed with the Secretary of State under the terms of a new act (Ap. 29-36). The Attorney General gave his opinion, dated July 16, 1945, that such tariff schedules were not included (Ap. 36-44). The Railway Commission has, therefore, refrained from filing any of its tariff schedules and the rates contained therein.

In 1947, the Legislature amended and re-enacted the filing statute (Ap. 44-53). No change was made in the definition of "rules." The tariff schedules and rates were not mentioned in the amendment. It can be assumed that the Legislature was advised of the Attorney General's interpretation of the act and the adoption of this interpretation by the Nebraska Railway Commission.

One of the 1947 amendments to the act provided that all "rules" should be submitted to the Attorney General

for an opinion as to their constitutionality before filing with the Secretary of State. As the constitutionality of utility rates involves their reasonableness, a technical question on which the Attorney General is not competent to speak, it can also be assumed that the 1947 Legislature did not intend tariff schedules or rates to be included in the scope of the act as amended. No tariff schedules have ever been filed with the Secretary of State (R. 12), and if such a requirement exists, every rate approved by the Nebraska Railway Commission covering services rendered by railroads, motor carriers, Pullman companies, telephone and telegraph companies, taxicab and express companies, was then and is now invalid, subject only to the effect of an amendment to the Act passed by the 1951 Legislature and hereinafter referred to.

Thus the matter stood on September 15, 1949, when the petitioner filed this action in the District Court of the United States for the District of Nebraska, and thus the matter stood when the District Court declined to follow the administrative interpretation of the Act adopted on the advice of the Nebraska Attorney General and confirmed by the 1947 Legislature. In short, the District Court rejected the interpretation under which rates affecting a vast segment of Nebraska economy had been issued by the Nebraska Railway Commission.

On appeal to the United States Court of Appeals for the Eighth Circuit, the District Court's order dismissing the cause was affirmed (R. 33) and the Court of Appeals declined petitioner's request that the proceedings be stayed until an authoritative decision of the Nebraska courts could be obtained on this question of Nebraska

law (R. 32). In overruling petitioner's petition for rehearing, the Court of Appeals expressed its regret that it was unable to afford the relief requested and stated that had it had the power to do so, it would have been inclined to grant the relief (R. 97).

While the order of the District Court was pending on appeal, the 1951 Nebraska Legislature having been advised of the existence of litigation challenging the administrative interpretation of the filing statute (Ap. 55) amended the definition of "rule" to exclude specifically rates adopted by the Nebraska Railway Commission. The 1951 amendment became effective on August 27, 1951. This amendment appears to affect only those rates adopted after the effective date of the Act. All rates adopted previously and whether now in existence or superseded, are still under the shadow cast by the District Court's ruling.

It is the contention of the petitioner for the reasons hereinafter stated that the ruling of the District Court is in error and that either it should be set aside or the District Court should be instructed to retain jurisdiction of the action for sufficient time to permit the parties to obtain an authoritative interpretation of the statutes from the Nebraska Court.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

I. In holding that the word "rule" as used in the Nebraska filing statute encompassed the tariff schedules promulgated by the Nebraska Railway Commission, the Court of Appeals for the Eighth Circuit has decided an

important question of law in a way conflicting with applicable Nebraska rulings.

II. In declining to follow an administrative interpretation of a Nebraska statute based on an opinion of the Nebraska Attorney General and confirmed by the reenactment of the applicable provisions of the act by the Nebraska Legislature with the effect that all rates promulgated by the Nebraska Railway Commission prior to August 27, 1951, were placed under a cloud of suspicion, the Court of Appeals for the Eighth Circuit has so far sanctioned a departure by the United States District Court for the District of Nebraska from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

III. In failing to remand the case to the United States District Court with instructions to retain jurisdiction for sufficient time to permit the parties to obtain an authoritative ruling by the Nebraska Court on the validity of the rates involved and in refusing to stay the proceedings in some other acceptable manner, the Court of Appeals for the Eighth Circuit has decided a federal question in a way probably in conflict with the applicable decisions of this Court.

IV. In refusing to suspend or state its decision and in declining to remand to the District Court with instructions to retain jurisdiction while the parties were given an opportunity to obtain a definitive ruling of the Nebraska court, the Court of Appeals for the Eighth Circuit rendered a decision in conflict with decisions of the Court of Appeals for the Seventh Circuit.

ARGUMENT

Proposition I.

In holding that the word "rule" as used in the Nebraska filing statute encompassed the tariff schedules promulgated by the Nebraska Railway Commission, the Court of Appeals for the Eighth Circuit has decided an important question of law in a way conflicting with applicable Nebraska rulings.

The Nebraska filing statute was enacted in 1945 and has not yet received judicial interpretation by the Nebraska courts. However, promptly after its enactment, the Nebraska Railway Commission requested an opinion from the Attorney General of Nebraska construing the act and its applicability to the various tariff schedules and general orders issued by the Railway Commission (Ap. 29-36). This request was honored by the Attorney General in an opinion dated July 16, 1945, in which, inter alia, the Attorney General held that the provisions of the Nebraska filing statute requiring the filing of all administrative "rules" with the Secretary of State did not apply to the tariff schedules promulgated by the Railway Commission (Ap. 36-44). Acting in accordance with this opinion, the Nebraska Railway Commission has not filed any of its tariff schedules with the Secretary of State.

The opinion of the Attorney General has never been withdrawn or amended in any way. To the best of petitioner's knowledge, it has never been challenged or questioned by or before any legislative, administrative or judicial officer of the State of Nebraska with the exception of the action now pending before the District Court of Lancaster County (R. 25). The Nebraska filing act has been twice amended, once in 1947 when the applicable

provisions of the act were re-enacted without change (Ap. 44-53), and once in 1951, when the legislature acted to remove prospectively the confusion created by the decision of the United States District Court in this case (Ap. 53-57).

Accordingly, the tariff schedules of the Nebraska Railway Commission in Nebraska have been held not to be included in the term "rules" as used in the Nebraska filing statute. The only dissent from this interpretation is the decision of the United States District Court in this case.

The construction of a statute by the highest officer of the Executive Department charged with its enforcement is entitled to considerable respect and should not and will not be set aside unless that construction contravenes the clear import of the statute. This doctrine has received the frequent and emphatic approval of the Nebraska Court. *Rohrer v. Hastings Brewery Co.*, 83 Neb. 111, 119 N. W. 27; *Douglas County v. Vinsonhaler*, 82 Neb. 810, 118 N. W. 1058; *State ex rel Village of Dakota City v. Bryan*, 112 Neb. 692, 200 N. W. 870; *Elmen v. State Board of Equalization and Assessment*, 120 Neb. 141, 231 N. W. 772; particularly where the Legislature has by its non-interference or re-enactment of the law given its implied assent to the construction adopted. *Chicago & N. W. R. Co. v. Bauman*, 132 Neb. 67, 77, 271 N. W. 256. This rule of law can, therefore, be taken to be firmly established in Nebraska.

The interpretation of the District Court, as affirmed by the Court of Appeals in this action, is diametrically opposed to the interpretation of that statute by the Ne-

braska Attorney General adopted by the Nebraska Railway Commission and confirmed by the Nebraska Legislature. No action by any Nebraska judicial, administrative or legislative body is in accord with the interpretation of the statute adopted by the Federal Courts. An administrative interpretation confirmed by the Legislature is conclusive in Nebraska and will not be set aside by the courts unless clearly wrong. Petitioner submits that the ruling of the District Court affirmed by the Court of Appeals is, therefore, in conflict with the proper Nebraska construction of this Nebraska statute.

Proposition II.

In declining to follow an administrative interpretation of a Nebraska statute based on an opinion of the Nebraska Attorney General and confirmed by the re-enactment of the applicable provisions of the act by the Nebraska Legislature with the effect that all rates promulgated by the Nebraska Railway Commission prior to August 27, 1951, are placed under a cloud of suspicion, the Court of Appeals for the Eighth Circuit has so far sanctioned a departure by the United States District Court for the District of Nebraska from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The District Court in dismissing the petitioner's cause of action wrote an opinion which had the effect of rendering questionable every rate charged by a domestic public utility or common carrier in Nebraska and approved by the Nebraska Railway Commission. The District Court held that for any such rate to be valid, it must be filed with the Secretary of State of Nebraska. None have been.

This ruling of the District Court was made despite the fact that the Nebraska Attorney General has spe-

cifically ruled that tariff schedules and their rates approved by the Nebraska Railway Commission need not be filed with the Secretary of State under the provisions of the Nebraska Filing Statute. It was made despite the fact that for four years the Nebraska Railway Commission had adopted the interpretation of the act made by the Attorney General and had refrained from filing any tariff schedules with the Secretary of State. It was made despite the fact that the Nebraska Legislature had amended and re-enacted the filing statute in 1947 after the opinion of the Attorney General interpreting that statute as applied to tariff schedules without changing the statutory definition of "rules." And it was made despite the fact that prior to the present controversy the administrative interpretation of the statute had not been challenged in any forum in Nebraska. What was settled administrative law in Nebraska was rendered unsettled by the District Court. To justify the action of the Court, the Nebraska construction of the act must be clearly wrong.

It is acknowledged in Nebraska that administrative construction of a statute by officer of the state charged with its enforcement is entitled to great weight particularly where that interpretation has had the benefit of years of application and has been undisturbed and confirmed by the Legislature. Only where the interpretation cannot be justified by any reasonable construction of the statute should it be set aside even by a court of the state. *Rohrer v. Hastings Brewery Co.*, 83 Neb. 111, 119 N. W. 27; *Douglas County, Neb. v. Vinsonhaler,* 82 Neb. 810, 118 N. W. 1058; *State ex Rel. Village of Dakota City v. Bryan,* 112 Neb. 692, 200 N. W. 870; *Chicago & North*

Western Railway Co. v. Bauman, 132 Neb. 67, 271 N. W. 256.

Likewise, the rule that the construction of a statute by officers charged with its interpretation and execution will not be set aside by the courts except for the most cogent reasons, has long been firmly adhered to by the Federal Courts, particularly by this Court. *So. Pac. Co. v. U. S.,* 59 S. Ct. 923, 307 U. S. 393, 83 L. Ed. 1363; *U. S. v. American Trucking Assns.,* 60 S. Ct. 1059, 310 U. S. 534, 84 L. Ed. 1345; *Fleming v. Mohawk Wrecking & Lumber Co.,* 67 S. Ct. 1129, 331 U. S. 111, 91 L. Ed. 1375; *Billings v. Truesdell,* 64 S. Ct. 737, 311 U. S. 542, 88 L. Ed. 917; *Levinson v. Spector Motor Service,* 67 S. Ct. 931, 330 U. S. 649, 91 L. Ed. 1158; *Adams v. U. S.,* 63 S. Ct. 1122, 319 U. S. 31, 87 L. Ed. 1421; *Bowtell v. Walling,* 66 S. Ct. 631, 327 U. S. 463, 90 L. Ed. 786. This should be particularly true where the statute involved is a state statute which has been interpreted by the state authorities charged with its administration. *Phyle v. Duffy,* 68 S. Ct. 1131, 334 U. S. 431, 92 L. Ed. 1494.

The last case exemplifies the position which, it is submitted, the District Court and the Court of Appeals should rightfully have followed in the present action since it gives an insight into the approach of this court to rulings of state attorney generals. The court there said:

> "The Attorney General is the highest non-judicial legal officer of California and is particularly charged with the duty of supervising administration of the criminal laws. His statement on this question

is entitled to great weight in the absence of controlling state statutes and court decisions."

Phyle v. Duffy, supra.

The construction given to the act by the District Court is not demanded by the clear import of the statute. The act nowhere mentions rates. The purpose of the act is to make available rules and regulations of administrative agencies in Nebraska which were not then easily obtainable. All tariff schedules adopted by the Nebraska Railway Commission are published as required by law and can be obtained from the public utility or common carrier rendering the service subject to the rates. In defining its terms, the act states that rules are rules.

"Rule means the written statement of any rule, regulation, standard or policy of general application * * * ."

84-901 R. R. S. Nebr. 1943.

Does this definition clearly include rates? The Nebraska Railway Commission thought not. The Nebraska Attorney General thought not. Only the United States District Court and the Court of Appeals have thought that it did. Petitioner contends that at the very least the question as to whether rates are included within the term "rules" is a matter of serious doubt in which the administrative interpretation was entitled to substantial weight not given to it by the District Court.

The District Court sought to find support for its position in the report of the Nebraska Bar Association Committee recommending the legislation. A careful reading, however, of this report clearly shows that the committee did not have in mind the rates and tariff schedules adopt-

ed by the Railway Commission in recommending this legislation. The District Court refers to the paragraph in that report in which the committee stated that the most striking illustration of the substantive rule-making power in Nebraska is the authority of the Railway Commission under Article 4, Section 20 of the Constitution, in the absence of legislation to regulate the rates and service of common carriers. The District Court, however, failed to note that it was the power of the Commission to regulate the *service* of common carriers which was discussed in the balance of the same paragraph which the committee singled out.

> "Under this provision, the Commission * * * may and does adopt regulations of a general legislative character. Its action in this behalf is usually taken by what it calls general orders." (Ap. 9.)

It was the unavailability of these general orders of the Railway Commission and not the rates promulgated by it that caused concern to the Bar Association Committee.

The same error appears in the opinion of the Court of Appeals (R. 49), where the Court again fails to distinguish between these "general orders or regulations" issued by the Railway Commission and the rates published under its auspices. The petitioner wishes to call the court's attention to the summary of the Nebraska Bar Association Committee in the action of the report on this problem.

> "There seems to be no practical source from which a lawyer could learn what general orders or regulations of the Railway Commission are now in force. Indeed, its rules of practice seem to be available only by consulting a typewritten copy at the

Commission's office. It seems clear that regulations of continuing force having the same effect as a legislative enactment should be published and acceptable to attorneys and others interested.

* * *

"Requirements for publication should be designed to serve a practical and not merely a formal purpose." (Ap. 9-10.)

It is submitted that neither the District Court nor the Court of Appeals gave the proper consideration to the established administrative construction of the Nebraska Filing Statute or to the effect which the overruling of that construction would have in Nebraska, and that, consequently, the action of the District Court affirmed by the Court of Appeals in dismissing the petitioner's cause of action is such a departure from the normal and usual course of judicial procedure as to call for the supervisory powers of this court.

Proposition III.

In failing to remand the case to the United States District Court with instructions to retain jurisdiction for sufficient time to permit the parties to obtain an authoritative ruling by the Nebraska Court on the validity of the rates involved and in refusing to stay the proceedings in some other acceptable manner, the Court of Appeals for the Eighth Circuit has decided a federal question in a way probably in conflict with the applicable decisions of this Court.

The problem presented by this case and the decision thereon made by the District Court highlight the importance of maintaining harmonious relations between parallel systems of state and federal courts. Where, as here,

a decision of the District Court would act only as a forecast of the ultimate and authoritative interpretation of a state statute by the state court, this court has on numerous occasions indicated that the proper procedure to be followed should be the referral of the state statute to the state court for its interpretation. *City of Chicago v. Fieldcrest Dairies, Inc.*, 316 U. S. 168, 62 S. Ct. 986; *Markham v. Allen*, 326 U. S. 490, 66 S. Ct. 296; *Meredith v. Winter Haven*, 320 U. S. 228, 64 S. Ct. 7; *Propper v. Clark*, 337 U. S. 472, 69 S. Ct. 1333; *Railroad Commission v. Rowan & Nichols Oil Co.*, 311 U. S. 570, 61 S. Ct. 343; *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496, 61 S. Ct. 463; *Shipman v. Du Pre*, 329 U. S. 321, 70 S. Ct. 640; *Spector Motor Service v. McLaughlin*, 323 U. S. 101, 65 S. Ct. 152; *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 476, 60 S. Ct. 628.

While it is true, as pointed out by the Court of Appeals in its order overruling petitioner's petition for rehearing that the majority of these cases involve the court's equity power, the fact that the case was not in equity has not prevented this court from following this procedure. *Shipman v. Du Pre*, 329 U. S. 321, 70 S. Ct. 640 (declaratory judgment). It is likewise true that the general power of the court to control the course of litigation before it gives the court ample authority to stay the progress of that litigation, if in the interests of the proper administration of justice it is necessary to do so in order to obtain additional information required for the proper disposition of the action. Thus in *Soulard v. U. S.*, 4 Pet. (U. S.) 511, 7 L. Ed. 938, Chief Justice Marshall, speaking for the court in an action

involving title to lands acquired by the United States in the Louisiana purchase, stated:

> "If the duty of deciding on these various titles is transferred by the Government to the Judicial Department, the laws and principles on which they depend ought to be supplied. The edicts of the preceding governments in relation to the ceded territory, the powers given to the governors, whether expressed in their commissions, or in special instructions, and the powers conferred on and exercised by the deputy governors, and their inferior officers, who may have been authorized to allow the inception of title, are all material to the correct decision of the cases now before the ocurt, and which may come before it. We cannot doubt the disposition of the government to furnish this information if it be attainable. We are far from being confident that it is attainable; *but we have determined to hold the cases which have been argued under advisement, until the next term, in the hope that, in the meantime, we may be relieved from the necessity of deciding conjecturally on interests of great importance.*" (Emphasis added.)

And in other cases similar to this action, the Courts of Appeal, in actions at law and statutory proceedings, have not hesitated to retain jurisdiction of an action pending a decision by a state court on a matter of state law. *Yellow Cab Co. v. City of Chicago* (7th Circuit), 186 F. (2d) 946; *U. S. v. 150.29 Acres of Land* (7th Circuit), 135 F. (2d) 878, cert. denied, 325 U. S. 882, 883, 65 S. Ct. 1576, 89 L. Ed. 1998.

It is likewise true that most of the cases in which this court has authorized the submission of a state issue to the state court have involved actions in which the constitutionality of a state statute, local ordinance or administrative ruling has been questioned, and the court has emphasized the desirability of avoiding unnecessary de-

cisions of a constitutional issue. *Propper v. Clark,* 337 U. S. 427, 69 S. Ct. 1333. This, however, is only one reason for referring state issues to state courts for determination. The desirability of avoiding an unnecessary construction of state law involving the public interests of the State as well as substantial property interests has likewise been recognized as a reason for such referral. *Thompson v. Magnolia Petroleum Co.,* 309 U. S. 478, 60 S. Ct. 628, 84 L. Ed. 876.

> "For we are here concerned with the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole."
>
> *Chicago v. Fieldcrest Dairies,* 316 U. S. 168, 173, 62 S. Ct. 986, 988, 86 L. Ed. 1355.
>
> "These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts exercising a wise discretion restrain their authority because of a 'scrupulous regard for the rightful independence of state governments' and for the smooth working of the federal judiciary."
>
> *Railroad Commission of Texas v. Pullman Co.,* 312 U. S. 496, 501, 61 S. Ct. 643, 645, 85 L. Ed. 971.

Where, as here, a decision of a federal court places in jeopardy all of the rates adopted by the state administrative agency authorized by state constitution and statutes to regulate all of the public utilities and common carriers within the state not subject to federal control, a scrupulous regard for the rightful independence of state governments and for the smooth working of the federal judiciary would seem to call for an abstention by the federal court and the referral of the state issue to the state courts.

Proposition IV.

In refusing to suspend or stay its decision and in declining to remand to the District Court with instructions to retain jurisdiction while the parties were given an opportunity to obtain a definitive ruling of the Nebraska court, the Court of Appeals for the Eighth Circuit rendered a decision in conflict with decisions of the Court of Appeals for the Seventh Circuit.

In refusing to stay its hand until the prime question of Nebraska law had been settled by the Nebraska courts, the Court of Appeals of the Eighth Circuit placed itself in direct conflict with two decisions of the Court of Appeals for the Seventh Circuit. The Eighth Circuit appears to have based its refusal to stay the proceedings solely on the ground that the present action is an action at law and not an action in equity, and in support of its position cites *Winterhaven, et al. v. Meredith,* 230 U. S. 228, 234. The court in its per curiam opinion overruling appellants' motion for rehearing, went on to say:

> "Had we the power to suspend or stay decision here (in some proper form and upon suitable terms) we would be inclined to do so." (R. 97.)

thus clearly indicating that the court was disposed to grant a stay but felt itself powerless to act.

This position is diametrically opposed to the recent action of the Court of Appeals for the Seventh Circuit in *Yellow Cab Co. v. City of Chicago,* 186 Fed. (2d) 946. There the Court of Appeals had before it an action for damages by the Yellow Cab Company for an alleged breach of contract by the City of Chicago arising out of the granting of taxicab licenses in excess of the number specified in a 1945 ordinance enacted pursuant to a con-

tract between Yellow Cab Co. and the City of Chicago. The Court of Appeals for the Seventh Circuit was not impressed by the fact that this was an action at law seeking a personal judgment for money. It was impressed by the fact that the question presented was one of purely local law on which the Illinois courts had not had an opportunity to pass, and that a decision by the Federal courts would amount only to a forecast of what the Illinois courts would hold. Accordingly the Court of Appeals held that the District Court had erred in dismissing the complaint on the ground that it did not state a cause of action.

> "But beyond any vain prognostication as to what the Supreme Court of Illinois would decide * * * we are unable to say what the law of Illinois is.
>
> "It is not our role to attempt to make the substantive law of Illinois. It is rather our limited function to ascertain what that law is to give it effect in our decisions. * * *
>
> "So here, where the question is solely one of Illinois law, we think it our duty to remand the cause to the District Court, insofar as it relates to an action for damages ex contractu and to direct that court to retain jurisdiction without further action until the parties shall have had an opportunity to obtain an authoritative decision in the courts of Illinois."
>
> *Yellow Cab Co. v. City of Chicago,* 186 F. (2d) 946.

The Court of Appeals for the Seventh Circuit had previously had before it an action brought by the United States of America to condemn 150.29 acres in Milwaukee on an appeal from the decree of the District Court. One

of the questions presented by the appellants was the priority of a certain lien for taxes. This was a statutory proceeding. Yet the court again did not hesitate to refer the question of Wisconsin law to the Wisconsin courts and to order the District Court to retain jurisdiction of the case until the parties had had an opportunity to secure that interpretation.

> "On the second question, as to when the lien for taxes attached, we are unable from an examination of the authorities to answer to our satisfaction the question as to when the lien for taxes does attach under Wisconsin law. This is a matter of vital concern to Wisconsin. We hesitate to intrude ourselves into a situation that requires us to make a decision as to what the law of Wisconsin is, when we are unable to discern with assurance what that law is. Since we are in doubt as to what the law of Wisconsin is on that point, we think it advisable to remand the case to the District Court with instructions to retain jurisdiction until the parties can seek the answer to this question in the courts of Wisconsin."
>
> *United States v. 150.29 Acres of Land*, 135 F. (2d) 878, 881, cert. denied, 325 U. S. 882, 883; 65 S. Ct. 1576; 89 L. Ed. 1998.

The Court of Appeals for the Eighth Circuit, in stating its regrets that it was powerless to act, indicated it was persuaded that the question of interpretation of the Nebraska filing statute was one of vital importance to the State of Nebraska, and one which would have been referred to the courts of Nebraska had the action been phrased in equity rather than in law. The Court of Appeals of the Seventh Circuit, by its decisions, has revealed that the nature of the problem and its public interest, rather than the chance circumstance of law or

equity, controls its decision as to whether the state courts shall be consulted on questions of state law. Thus a conflict exists which calls for a definitive ruling by this court.

CONCLUSION

Petitioner submits that the decision of the Court of Appeals sought to be reviewed is in conflict with the decisions of the Court of Appeals for the Seventh Circuit, that it decides an important question of Nebraska law in a way conflicting with applicable Nebraska rulings and an important question of federal law in a way conflicting with applicable decisions of this court. In addition the petitioner submits the decision is so contrary to the accepted and usual course of judicial proceedings that it should and of rights ought to be reversed and the petitioner's cause of action reinstated in the United States District Court. Wherefore the petitioner respectfully prays for a writ of certiorari to the Court of Appeals for the Eighth Circuit to review the decision of that court in this case.

Respectfully submitted,

EINAR VIREN,
SWENSON, VIREN and TURNER,
Attorneys for Petitioner.

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CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1951

No. 350

JOSEPH MOGIS,

Petitioner,

vs.

LYMAN-RICHEY SAND & GRAVEL CORPORATION, A CORPORATION,

Respondent.

APPENDIX TO PETITION FOR CERTIORARI AND BRIEF IN SUPPORT THEREOF

EINAR VIREN,
SWENSON, VIREN & TURNER,
Attorneys for Petitioner.

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REPORT OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE AGENCIES AND TRIBUNALS

Vol. 22, Nebr. Law Review No. 4, pp. 29-39

"This committee is charged with the responsibility of considering the functioning of administrative agencies and tribunals of this state and the provi-

sions for review of their decisions, with recommendations for reform; and to study the reasons for 'the decline in the use of their services by members of the legal profession,' and recommend any remedies it may have.

"The committee assumes that the joinder of these two responsibilities was not without significance. It is taken to be a reflection of the belief that a process is going on by which the function of the lawyer is being minimized through new governmental machinery and methods of procedure. Later in this report we shall examine this premise, and relate the results of our study in this regard.

"We cannot assume, however, that this association is interested in administrative tribunals only as they may be associated with enhanced professional employment. Hence our principal purpose has been to consider the place and functioning of these agencies in Nebraska entirely from the standpoint of the interest of the public in their operation. The reader of this report will be saved from disappointment if we say at the outset that the results of our study are general and it may be superficial. The subject is entirely beyond the bounds of what can be dealt with on the basis of a brief spare-time assignment.

PRELIMINARY CONSIDERATIONS

"One of the first reflections which is borne in upon the student of this subject is that the problem does not separate itself for consideration as sharply as he might wish. In our own state there are a few agencies specially constituted to exercise regulatory functions in certain fields, notably the State Railway Commission, which we recognize as typical of our problem. But we see other important regulatory functions lodged in other departments of government where their administration is mingled with activities

of wholly different character. This is illustrated by the Department of Roads and Irrigation, which has important administrative functions covering the use of water for irrigation and other purposes, along with the function of constructing and maintaining the state highway system. The result is that many administrative powers are being exercised by departments of government which would not ordinarily be referred to at all as administrative tribunals.

"It has been the natural and proper concern of our profession that administrative bodies at times exercised their powers without adequate protection against arbitrary action through procedural safeguards and judicial review. The comment seems justified that at times this concern is directed most strongly at those departments and agencies specially set up and recognized as administrative tribunals, where in truth these safeguards are best observed, while neglecting other departments of government exercising similar powers with little regard for the restraints of procedural due process.

"It may be conceded that there is much regulatory activity in the fields of public health and public safety where summary procedures are necessary and proper. However, our interest in the administrative process should not be diverted from a particular governmental activity because its habitual or prescribed procedures are summary. Attention has recently been directed to the extent to which among our state governments the exercise of the licensing power is unrestrained. By the same token, criticism should not be reserved entirely for the derelictions of those agencies which have attained a high degree of dependable regularity in their procedural methods.

"We have made no attempt to determine how many administrative agencies could be identified in the state government of Nebraska. The Attorney General's Committee on Administrative Procedure

lists 28 in the federal government, but this list treats as a single agency each of the major executive departments, and other agencies, such as the Federal Security Agency, which administer many different functions under numerous divisions, offices, boards, administrations and the like. Report of Attorney General's Committee, pp. 3-4. Landis quotes other estimates as ranging from 50 to 115. The committee on administrative law of the Minnesota State Bar Association reports that it considers there are some 53 administrative agencies in that state.

"We have indicated that it would be wholly artificial to think the problem related only to boards and commissions as such. It inheres in the kind of function being administered rather than in the kind of tribunal which is administering it. Indeed, the habit seems to have been more marked in Nebraska than in some other states to vest important administrative power in regular officers or departments of government rather than in commissions. Generally, however, it is difficult to see any clear line of development in this respect. In 1933 the Special Committee on Administrative Law of the American Bar Association observed a 'marked tendency' in this direction in recent federal legislation. 58 A. B. A. Rep. 416. Since then several very important boards and commissions have been created, and it would now be doubtful if the last ten years have followed any pattern in this regard.

"At the same time, it would be unprofitable to attempt a precise definition of what is to be understood by the term 'administrative' as applied either to an office or a function. We shall be understood equally well if we leave the field indistinct at its boundaries.

"Much of the criticism which appears to be directed at the methods of procedure of these agencies is in truth a criticism of the existence of govern-

mental activity in the particular field in question. The extension of governmental activity in recent periods of time has, of course, been enormous. Political controls have been introduced into many phases of economic life. For good or ill this has been going on all over the world, but this committee was not constituted to deal with this problem. It is charged with considering the methods by which this extending governmental activity is administered.

"Some other criticism is actually criticism of individuals. We are not likely to think well of procedures which are administered by those we distrust. It is not too much to say that the general satisfaction in this state with methods of administrative procedure is associated with a generally high level of competency and integrity among those charged with their administration. Many feel that here alone can there be adequate protection of fundamental rights.

"The forms in which these agencies act, and the means by which a review may be had of their acts in the courts are the subject of our study. We have thought it wise to confine particular consideration to a few agencies. Anything more than this would have been impracticable. There are other agencies in the state of great importance; there are many others of varying degrees of importance. We have reason to believe that those studied are typical enough to illustrate anything of general significance.

"A complete description of the functions of even these agencies would be much too tedious for such a report as this. What follows is in the nature of some general observations concerning problems of administrative procedure as they appear in this state from a consideration of these agencies. Specific suggestions for reform are few. This will not be surprising to many. There may be less than the usual basis for complaint in Nebraska; in some cases evils may seem less acute in fields where the observer is more

at home; principally, it reflects the fact that excellence of administration depends far more on people and purpose than it does on forms or methods.

JUDICIAL REVIEW

"Great variety characterizes the provisions for judicial review of administrative action in this state. It may lie in a district court or in the supreme court; it may be upon the record made before the administrative body or upon new evidence; it may be a trial *de novo* or not; varying degrees of conclusiveness may attend the administrative decision. Probably some of this variety is nothing more than haphazard. The importance of judicial review warrants thoughtfulness and continued study. It does not follow, however, that there is any vice in mere variety. It is the judgment of this committee that the great variety of administrative function precludes any uniform system of judicial review.

"The habitual confidence of lawyers in the courts leads them to look with distrust on clothing administrative decisions with finality. Naturally this aspect of administrative law has been of most interest to them. In the nature of things judicial review is the only aspect of administrative procedure with which the courts are concerned, and it is the subject matter of discussion in judicial decisions. It results that much thought has been devoted to the problem as to what should be the scope of judicial review. Many refinements have been suggested and appear in various statutes. This committee has several comments upon this subject.

"Judicial review at best is an inadequate guarantee of good administrative procedure and results. Anyone who has long observed appellate review of cases tried in the lower courts knows that a very great part of what goes on in the trial court is not subject to any effective review. The necessity for this is brought about by the requirements of handling

judicial business. The same conditions are bound to prevail as between administrative bodies and the reviewing courts.

"The moral would seem to be that improvement in administrative procedure must come principally from attention directly to the practices and personnel of the agency itself rather than through the medium of judicial control and review.

"The necessity of judicial review, of course, still remains, and the definition of the scope which it ought to have is proper for study, but it should not be the entire reliance of those interested in improved administrative procedure. Indeed, the actual scope of judicial review may depend much less on the avowed boundaries as they appear in a statute or set of decisions, than upon the underlying and perhaps unspoken attitude of the courts to the agency or subject matter in question.

"In this connection it should be remembered that a measure of conclusiveness of administrative decision is not wholly an invention of the legislature. The courts at times have placed limitations upon themselves quite beyond statutory compulsion. The constitutional federal courts have adopted a restricted view of their authority to review ordinary fact determinations of administrative agencies. See also *Furstenberg v. Omaha & C. B. St. Ry. Co.*, 132 Neb. 562, 272 N. W. 756, 760. In the federal field, this has led to suggestions for the creation of special review tribunals, and of an administrative 'court'. These are primarily suggestions for administrative rather than judicial review. Experience in the field of appellate judicial procedure does not suggest that a multiplicity of successive appeals is any guarantee of justice.

"A general view of this matter in Nebraska indicates that both in statutory pattern and judicial decisions extremes have been avoided. It is common

to provide for a review upon the record before the board or agency, with or without other evidence. Sometimes it is provided that the trial shall be *de novo*. In several instances a direct appeal to the Supreme Court is provided with a review based on the record made before the agency. This is illustrated by appeals from the Railway Commission C. S. Sec. 75-505, and in certain cases from the Department of Roads and Irrigation, Sec. 81-6315. Whatever the court may have said about the conclusiveness of administrative findings, it has on various occasions found it appropriate to set aside such determinations.

ADMINISTRATIVE RULES AND REGULATIONS

"It is of the essence of the administrative process that application is made to specific situations of much more general statutory standards and purposes. This may proceed in a case by case manner, or it may be facilitated by the adoption by the agency of rules which will govern its application of the statute. These substantive rules should be distinguished from mere rules of procedure and practice. The scope and necessity for rules of the latter type in any agency will depend upon the formality of its procedures and upon the extent to which the legislature has failed to provide detailed procedural steps. Whether formalized and published or not, every department of government must have rules for conducting its affairs. Some of the agencies we have studied have written rules of practice; others do not have them to the same extent. This subject seems to have been dealt with adequately.

"Statutes often authorize agencies to make such regulations, consistent with the statute, as may be needed to carry out its provisions. This process of substantive rule-making has been much studied by those interested in the improvement of administrative procedure.

"Perhaps the most striking illustration of the substantive rule-making power in Nebraska is in the authority of the Railway Commission under Article IV, Section 20, of the Constitution, in the absence of legislation, to regulate the rates and service of common carriers. Under this provision, the Commission not only may take specific action directed at a particular carrier; it may and does adopt regulations of a general legislative character. Its action in this behalf is usually taken by what it calls general orders. Their adoption seems to be taken only after hearing or opportunity for hearing. Under these orders or rules, the Commission has provided comprehensively for the regulation of taxicab companies, it has forbidden extension into new territory by certain utilities without a certificate; it has taken other important action.

"The nature and scope of the rules adopted by other agencies in Nebraska are not a matter of special interest. We wish to direct attention only to the lack of generally effective means of publishing and making available the rules so adopted. No doubt in practice most businessmen and others interested keep currently informed as to regulations of these agencies affecting their particular affairs. Much of the material is readily available. Some regulations are required by statute to be printed and made publicly available; some are required to be filed with the Secretary of State, e. g., rules of the Division of Placement and Unemployment Insurance.

"This is not universally true, however. The committee wishes to call attention to what it regards as an unsatisfactory situation in this respect. There seems to be no practicable source from which a lawyer could learn what general orders or regulations of the Railway Commission are now in force. Indeed, its rules of practice seem to be available only by consulting a typewritten copy at the Commission's office. It seems clear that regulations of continuing

force having the same effect as a legislative enactment should be published and accessible to attorneys and others interested.

"We express our belief in the desirability of a requirement for filing regulations in some designated registry, such as the Office of the Secretary of State, and otherwise making them publicly available. Requirements for publication should be designed to serve a practical and not a merely formal purpose. Several states have adopted statutes in recent years to insure the availability and public knowledge of administrative regulations. The usefulness of the Federal Register is familiar to all.

SEPARATION OF FUNCTIONS

"One of the commonest suggestions for administrative reform is for the separation of the function of prosecution from that of judging. Recommendations for action in the federal field recently have embraced proposals for independently appointed hearing commissioners with adequate salaries and long terms of office.

"It is not the purpose of this committee to consider this problem comprehensively. We make several observations. This problem presents itself particularly with those agencies which chiefly initiate regulatory proceedings, rather than those which principally pass upon complaints or applications presented to them. The problem is prominent where the prosecuting function is important. It may be that the problem is not so much the difficulty of securing unbiased adjudication, as it is in the possibility of unrestrained and irresponsible prosecution. There are many situations where the institution of proceedings with attendant publicity may be more serious than any order which may finally emerge. Independent adjudication is certainly an incomplete protection against administrative oppression. In some sit-

uations it might even tend to make the initiation of prosecution less responsible than it would otherwise be.

"While the creation of a corps of independent and expert trial examiners is quite feasible for the great federal commissions, it is hardly practicable for such agencies as might present such a problem in this state. In few cases is the importance of the authority exercised by them fairly measured by the frequency of formal adjudication following adversary proceedings.

UNIFORMITY OF PROCEDURE

"Proposals for reform of administrative procedure often take the shape of a suggested statute prescribing a code of uniform procedure for administrative agencies. Some of the suggestions for reform of federal administrative agencies have been of this kind.

"It may be agreed that it might be practicable to prescribe in this manner some minimum requirements suitable to all agencies. Something of this sort is the objective of the proposed Uniform Administrative Procedure Act, now being given advanced consideration by the Conference of Commissioners on Uniform State Laws. It would cover such matters as filing and publishing rules, making declaratory rulings, general provisions governing notice and hearings in contested matters, judicial review, etc.

"It would be pleasant, of course, if administrative procedure could be reformed and perfected by a single statute. But the problem is not so simple. We referred earlier in this report to the variety of function and of agency involved in the administrative process. Some deal principally with a vast num-

ber of simple transactions, others with a few complicated ones. Some of these matters lend themselves to formal treatment through evidence in the manner of a lawsuit, others do not. Some permit great deliberation, while others must be acted on at once.

"It is believed that any single method of procedure which might be appropriate for agencies where hearings are typically formal and the subject matter capable of testimonial treatment, would be wholly unworkable for agencies which handle many matters informally and where judgment must rest upon criteria of different character. Calling a great variety of governmental functions 'administrative' does not make them all alike.

"We are bound to be skeptical of any simple solution of so complex a problem. It is believed that there are three courses worth following:

"1. Attention to each existing or proposed agency to insure that the statute under which it is to operate is as free as possible from imperfections. The result will be only such uniformity as is consistent with the variety of problems dealt with.

"2. The achievement of as high a degree of competence in personnel as is possible. Improvement in the forms of procedure will be a very barren thing if there is deterioration in the worthiness of those who administer them. This involves concern about the qualifications of both the elected or appointed agency heads and also the staff of the agency.

"3. The development of a tradition of excellence of workmanship in the administrative process itself. This implies the development of standards, with attendant freedom from the influence of prejudice, political pressure or expediency.

"The second matter with which the committee is charged has to do with legal employment in its re-

lation to the growth of the administrative process. Presently existing conditions preclude any current appraisal which would be reliable. The immediate past President of the American Bar Association recently said:

> " 'Ever since our generation has been admitted to the Bar or, roughly, for that length of time, there has been alarm among the members of the Bar with the "overcrowding" of the Bar, the surplusage of lawyers, their interference economically with one another, because there are too many of them and they are too easy to employ. That situation, at least for the first time in my lifetime, is changing. There is definitely growing in this country and already has appeared in several localities and in several lines of occupation, a shortage of lawyers. Lately we have been trying to increase the supply of lawyers, whereas a few months ago we were trying to increase the demand for them. There is no doubt that governmental offices, municipal, state and federal, are facing a dearth of lawyers, notwithstanding the cartoons about 2700 lawyers in the OPA.'

"On some fairer day, however, our brethren will come back from the service, the law schools will reopen their doors, and we shall have occasion to think of things at longer range. We may now properly look at some of these things which pertain to the long run.

"It must surely be regarded as anomalous if there should be a decline in the requirements for legal services in the face of a vast expansion of the application of law to private life and affairs. There may be periods of transition, but it seems unlikely that if the role of government is to continue to mount, the place of the lawyers will become less. This could only result from a fatal incapacity of lawyers to adjust themselves to a changing society.

"No doubt some of the older conventional sources and types of law business are drying up. To a limited extent this has been contributed to by the development of administrative machinery. The readiest example is in the case of workmen's compensation legislation, superseding the former field of master-servant litigation. In theory, a judicial remedy against common carriers for unreasonable charges was supplanted when public utility commissions were established. On balance, however, it can hardly be said that the development of administrative tribunals has reduced the field of professional employment for lawyers. If the amount of legal employment has been shrinking, the reason must be sought elsewhere.

"An extremely direct approach to the problem is the suggestion in one form or another that practice before administrative agencies be limited to lawyers. Our supreme court had occasion recently to consider to what extent practice before the Railway Commission is the practice of law. *State ex rel Johnson v. Child,* 139 Neb. 91, 295 N. W. 381. For the protection of the public as well as for its own protection, the bar should be as zealous here as elsewhere to see that laymen do not practice law. But the truth is that only a few agencies in this state conduct hearings with any frequency; the great mass of their business is dispatched without formal adversary proceedings of any kind.

"This committee believes that there is a greater place for lawyers in this process than they have so far occupied. Its doubts are grave that such a place can be effectively made by artificial or restrictive measures.

"One characteristic of present-day activity seems to be that its legal aspects are more dispersed than formerly. The making of a will, the purchase of real estate, the organization of a corporation—these and other usual legal matters are such as befit the habitu-

al procedures incident to consulting a lawyer. On the other hand, the impact of much of modern administrative control of business is a continuous thing, often of daily or hourly concern. The business manager is uncertain how much he ought to expect a lawyer to know about the matter, and it may seem to present an immediate occasion quite inadequate to warrant consulting him. So we find systems of governmental control of price, of wages, of hiring, of production, of great areas of economic life developing and being applied with very little participation by lawyers acting for or advising those who are subject to the controls. The employment by the government of lawyers in large numbers in preparing and applying these regulations suggests that the field is not foreign to our profession.

"Now much of this is a wartime condition and much of this governmental regulation we expect to disappear. But much was here before the war and much will remain after the war. Are businessmen to look to government employees not only for administration of regulations, but for advice and guidance in these fields which are not quite conventional law and not at all conventional business?

"In answer we can make a few observations only:

"1. Lawyers cannot hope to hold a place in any field unless they have learning or skills which serve their clients there. Present-day administrative activity poses great problems of accessibility to whatever needs to be known in order to participate intelligently. Sometimes an inner circle of practitioners may be interested in keeping it so. Whatever these difficulties are, they will have to be overcome. We should not underestimate the skills which capable lawyers possess in analysis and in marshalling and presenting factual material. Governmental activity may all the time be creating new situations calling

for such work, but there is nothing new about lawyers participating in it.

"2. It is not unnatural for lawyers to have a certain disdain for practicing law out of newspapers and looseleaf services. There must surely be immense room for improvement in this respect, but in the meantime, we can hardly afford to yield much to mere prejudice.

"3. Thought might well be given to a better organization of the going relationship between lawyers and their business clients. This involves such matters as accessibility, charges and recognition that much of that with which we are concerned is legal in character only to a limited extent and in certain aspects.

"If these new legal problems are now to be found dispersed throughout the affairs of a business, emerging frequently, but often as a matter of only minor consequence, then lawyers can serve their clients well only by taking thought of physical arrangements which are adapted to this situation. Likewise compensation for services must properly be adapted to the subject matter.

"4. Continued attention should be given to the development in the profession of cooperative procedures appropriate in this field. The success of the tax clinics testifies to the usefulness of that device. The section of this association on Administrative and Labor Law has made important contributions, and could properly look forward to further extending the scope of its activity. Local bar associations can be of great benefit to their members in exploring in similar manner some of these new fields, or in otherwise providing material and information. On an individual basis there may need to be more recognition of the importance of professional consultation with other attorneys who are specially qualified, or in some cases referring clients to them.

"5. The usefulness of an attorney to a business client depends in a large degree upon the intimacy of his acquaintance with the client's business. Practicable ways may need to be sought to achieve this result on a current basis.

"If participation by lawyers in this great area where government meets business has to depend upon analyzing and segregating matters which can properly be called exclusively 'legal', their participation will be very limited. The line between law and modern business has never been sharp. It is less than ever so today.

"If we are in a period of change, then the final shape and character of the administrative process is not now clearly apparent. A certain instability is bound to accompany such a process of development. We believe that the ways of many administrative agencies at present lack obedience to acceptable and predictable standards, which we may broadly call law. The correction of this fault is worthy of our efforts. The development in this regard of this great domain of administrative legislation may determine in the end how much law there is to practice in this field.

"It goes without saying that economic society will forge the instruments and techniques which it requires to function in a period when political control exercised through administrative procedures of various kinds are numerous and pervasive. Likewise, it seems likely that government will continue to develop and use these procedures. There is no reason to think that our profession cannot have such part in this process as it deserves. It ought to be a very large and useful part.

"Your Committee recommends:

"1. That the committee be continued with instructions to continue the study of specific admin-

istrative law problems in Nebraska and make recommendations.

"2. That the Association support legislative action to insure the filing in a recognized registry and the adequate publication of all administrative regulations now or hereafter in effect.

Respectfully submitted,

Tracy J. Peycke, Chairman
James L. Brown
Edwin Cassem
Harry E. Gantz
Harlan G. Greenamyre
Robert R. Troyer
Robert Van Pelt
John J. Wilson."

HISTORY OF L. B. 138, NEBRASKA LEGISLATIVE JOURNAL, FIFTY-EIGHTH SESSION 1945

L. B. 138:

Jan. 16 Read first time.....Page 108

"LEGISLATIVE BILL 138. By John E. Mekota of Saline

"A bill for an act relating to state government; to define terms; to require the filing and publication of rules of administrative agencies; and to prescribe their effect as evidence."

Jan. 16 Referred to Committee on Judiciary.....Page 110

"MOTION—To Refer Bills

"Mr. President: I move that the rules be suspended and that all bills introduced today be immediately referred to standing committee.

(Signed) C. Petrus Peterson.

"The motion prevailed with 35 ayes, 0 nays and 8 not voting.

Bills Referred to Standing Committees

Committee

* * *

L. B. 138 ..... Judiciary

* * * ."

Jan. 19 Notice of hearing ..... Page 130

"NOTICE OF COMMITTEE HEARINGS

* * *

JUDICIARY

* * *

L. B. 138 Wednesday, January 31, 1945, 2:00 P. M."

Feb. 5 Placed on General File ..... Page 274

"Placed on General File with amendments.

"Standing Committee amendments to L. B. 138:

"1. Amend the bill by striking all of section 2 and by inserting in lieu thereof the following:

" 'Sec. 2. Each agency shall file forthwith in the office of the Secretary of State a certified copy of the rules in force and effect in such agency on the effective date of this act. A certified copy of any rule adopted after the effective date of this act shall likewise be so filed. Such copy or copies shall be printed, typed and mimeographed on legal size paper. The Secretary of State shall keep a permanent file of all such rules, which shall be open to public inspection.'

"2. Amend the bill, section 3, lines 1 and 2, by striking the words 'any rule hereafter adopted by it' and inserting in lieu thereof the words 'its rules'.

"3. Amend the bill, section 4, line 4, by striking the words 'of each rule' and inserting in lieu thereof the words 'the rules'.

"4. Amend the bill, section 5, line 2, by inserting after the word 'print' and before the word 'all' the following: ', type or mimeograph'.

"5. Amend the bill, section 6, line 4, by inserting the punctuation '.' after the word 'adopted' and by striking all of lines 4 and 5 after the word 'adopted'.

(Signed) John E. Mekota, Chairman."

Feb. 7 Laid over ..... Page 306

"Laid over."

Feb. 8 Considered. Referred for review ..... Page 316

"Read and considered.

"Standing Committee amendments found in the Legislative Journal for the Twenty-fifth Day were adopted.

"Referred to E and R for review."

Feb. 14 Placed on Select File ..... Page 356

"Placed on Select File as amended.

"E and R amendments to L. B. 138:

"1. In Standing Committee amendment 3, 2nd line, strike the word 'of' before the word 'each.'

"2. In the bill, section 3, line 3, strike: 'the end, and in lieu thereof insert: 'bring' and in said line strike: 'of bringing' and in lieu thereof insert a comma.

"3. In the bill, section 5, line 6, strike the word 'cost' and in lieu thereof insert: 'charge', and after the word 'agency' insert a comma.

"4. In the bill, title, 3rd line, strike: 'and publication of rules of' and in lieu thereof insert: 'of certified copies of and the publication and distribution of printed, typed or mimeographed copies of the rules of the'; 4th line, after the word 'agencies' and before the semicolon, insert: 'or the State of Nebraska, as prescribed' and in said line strike: 'prescribe their' and in lieu thereof insert: 'provide the use of and the'; 5th line, strike the period and in lieu thereof insert: 'of such certified copies thereof.'

"5. In the bill, section 1, line 1, decapitalize the word 'Act'; line 2, strike: '(a)' and in lieu thereof insert: '(1)'; line 6, strike '(b)' and in lieu thereof insert '(2)'.

Feb. 16 Referred for engrossment ..... Page 401

"E and R amendments found in the Legislative Journal for the Thirty-second Day were adopted. Referred to E and R for engrossment."

Feb. 23 Correctly engrossed ..... Page 478

"Correctly engrossed."

Feb. 28 Final reading ..... Page 517

"A bill for an act relating to state government; to define terms; to require the filing of certified copies of and the publication and distribution of printed, typed or mimeographed copies of the rules of the administrative agencies of the State of Nebraska, as prescribed; and to provide the use of and the effect as evidence of such certified copies thereof.

"Whereupon the President stated: 'All provisions of law relative to procedure having been complied with, the question is, "Shall the bill pass?"'"

"Voting in the affirmative, 39:

Adams	Cullingham	Klaver	Raecke
Anderson, J.	Foster	Lee	Reavis
Anderson, L.	Garber	Lusienski	Ryan
Babcock	Hanna	Mekota	Schultz
Brodahl	Heiliger	Mueller	Seaton
Burney	Hern	Norman	Sorrell
Burnham	Hoyt	Ogden	Tvrdik
Carlberg	Hubka	Peterson	Weborg
Conklin	Jeffords	Pizer	Wood
Cronin	Kain	Raasch	

"Voting in the negative, 0.

"Not voting, 4:

Carmody Crossland Dooley Doyle.

"A constitutional majority having voted in the affirmative, the bill was declared passed and the title agreed to."

Mar. 1 Correctly enrolled. Signed by Speaker..... Pages 524, 533

"Correctly enrolled."

"Speaker Signs.

"While the Legislature was in session and capable of transacting business, the Speaker signed:

"L. B. 138 * * *."

Mar. 2 Presented to Governor ..... Page 542

"STANDING COMMITTEE REPORTS.

Enrollment and Review

"Presented to the Governor for approval March 2, 1945, 9:30 A. M.: * * * L. B. 138 * * *.

(Signed) Roy B. Carlberg, Chairman."

Mar. 5 Approved by Governor ..... Page 556

"Approved by the Governor

March 3, 1945

"To the President, the Speaker and
Members of the Legislature.

Gentlemen:

"I have been requested by Governor Dwight Griswold to inform your honorable body that he has this day approved the following bills:

* * * L. B. 138 * * *.

"Respectfully submitted,

(signed) H. G. Greenamyre

Sec'y. to the Governor."

———o———

TEXT OF L. B. 138, 1945
SESSION LAWS OF 1945

"ADMINISTRATIVE AGENCIES FILING AND PUBLISHING THEIR RULES

Legislative Bill No. 138, Serial No. 56
A Bill

"FOR AN ACT relating to state government; to define terms; to require the filing of certified copies of and the publication and distribution of printed, typed or mimeographed copies of the rules of the administrative agencies of the State of Nebraska, as prescribed; and to provide the use of and the effect as evidence of such certified copies thereof.

"Introduced by John E. Mekota of Saline.

"Be it enacted by the people of the State of Nebraska,

"Section 1. For the purposes of this act: (1) 'Agency' means each board, commission, department,

officer, division or other administrative office or unit of the state government, authorized by law to make rules, except the courts and the Legislature;

"(2) 'Rule' means the written statement of any rule, regulation, standard or policy of general application, issued by an agency, including the amendment or repeal thereof, and designed to implement, interpret or make specific the law enforced or administered by it, or governing its organization or procedure, but not including regulations concerning the internal management of the agency not affecting private rights or interests.

"Sec. 2. Each agency shall file forthwith in the office of the Secretary of State a certified copy of the rules in force and effect in such agency on the effective date of this act. A certified copy of any rule adopted after the effective date of this act shall likewise be so filed. Such copy or copies shall be printed, typed or mimeographed on legal size paper. The Secretary of State shall keep a permanent file on all such rules, which shall be open to public inspection.

"Sec. 3. Each agency shall cause its rules to be published in such manner as the agency shall determine, to bring, as far as practicable, the existence and scope of the rule to the attention of all persons affected thereby.

"Sec. 4. Each agency shall file with the Clerk of the Legislature, not more than thirty nor less than ten days prior to the commencement of each regular legislative session, a certified copy of the rules of the agency in force and effect at the time of filing, for the consideration of the Legislature.

"Sec. 5. Each agency shall periodically and as often as necessary compile and print, type or mimeograph all rules adopted by it and remaining in effect. Copies shall be made available to all interested persons on request, at a price fixed to cover costs of

publication and mailing; Provided, however, any such agency may furnish the same without charge, in the discretion of the agency, if funds are available.

"Sec. 6. No rule shall be effective unless filed with the Secretary of State as herein required. The filing of any rule as herein provided shall give rise to a rebuttable presumption that it was duly and legally adopted.

"Approved March 3, 1945."

———o———

HISTORY OF L. B. 388, NEBRASKA LEGISLATIVE JOURNAL, FIFTY-EIGHTH SESSION 1945

L. B. 388:

Apr. 18 Read first time ..... Page 1090

"BILL ON FIRST READING

"The following bill was read the first time by title:

"LEGISLATIVE BILL 388. By Committee on Judiciary, John Mekota, Chairman.

"A bill for an act to amend sections 1 and 2 Legislative Bill 138, Fifty-eighth Session of the Nebraska Legislature, relating to state government; to define terms; to except rate tariffs, together with rules of interpretation thereof, from requirements of act; to provide manner in which copy of administrative rules shall be filed with the Secretary of State; and to repeal the original sections."

Apr. 18 Motion. Placed on General File ..... Page 1090

"MOTION—To suspend Rules

"Mr. President: I move to suspend the rules, and that L. B. 388 be placed on General File.

(Signed) John E. Mekota

"The motion prevailed with 30 ayes, 0 nays, and 13 not voting."

Apr. 27 Considered. Referred for review.....Page 1247

"Read and considered.

"Mr. Peterson offered the following amendments, which were adopted:

"1. Amend section 1 of the bill, line 8, by inserting after the word 'courts' the following:

" ', State Railway Commission'.

"2. Amend section 1 of the bill, lines 15 and 16, by reinstating the stricken matter and striking the new matter contained therein.

"3. Amend the title of the act, lines 4 to 6, inclusive, by striking the following:

" 'to except rate tariffs, together with rules of interpretation thereof, from requirements of act;'

"Advanced to E and R for review."

Apr. 30 Placed on Select File ..... Page 1286

"Placed on Select File as amended.

"E and R amendments to L. B. 388:

"1. In the bill, section 1, line 2, strike 'Legislature,' and in lieu thereof insert: 'State Legislature, 1945,'; line 4, before the word 'For' insert: 'Section 1.'; line 10, strike the comma after the word 'application' and in lieu thereof insert ';'.

"2. In the bill, section 2, line 2, strike 'Legislature,' and in lieu thereof insert: 'State Legislature, 1945,'; line 3, before the word 'Each' insert: 'Sec. 2.'; insert the word 'the' at the end of line 8, after the word 'unless'; line 9, after the word 'form' insert the word 'shall'.

"3. In the bill, section 3, line 2, strike 'Legislature,' and in lieu thereof insert: 'State Legislature, 1945.'.

"4. In the bill, title, line 3, strike the word 'Legislature' and in lieu thereof insert: 'State Legislature, 1945'; line 6, strike 'manner in which' and in lieu thereof insert: 'the manner in which a'; line 4, after 'government;' insert: 'to eliminate the State Railway Commission from the provisions of this act;'."

May 1 Referred for engrossment ..... Page 1301

"E and R amendments found in the Legislative Journal for the Eighty-Second Day were adopted.

"Advanced to E and R for engrossment."

May 4 Correctly engrossed ..... Page 1362

"STANDING COMMITTEE REPORTS

Enrollent and Review

* * *

LEGISLATIVE BILL 388. Correctly engrossed.

* * *

(Signed) Roy B. Carlberg, Chairman."

May 8 Motion. Final reading ..... Pages 1398, 1405

"MOTION—To Suspend Rules

"Mr. President: I move to suspend the rules and take up the bills on final reading for May 9, 1945.

(Signed) Fred A. Mueller.

"The motion prevailed with 33 ayes, 0 nays and 10 not voting."

"BILLS ON FINAL READING

"The following bills were read and put upon final passage:

"LEGISLATIVE BILL 388.

"A bill for an act to amend sections 1 and 2, legislative bill 138, Fifty-eighth Session of the Nebraska State Legislature, 1945, relating to state government; to eliminate the State Railway Commission from the provisions of this act; to define terms; to provide the manner in which a copy of administrative rules shall be filed with the Secretary of State; and to repeal the original sections.

"Whereupon the President stated: 'All provisions of law relative to procedure having been complied with, the question is, "Shall the bill pass?"'

"Voting in the affirmative, 38:

Adams	Cronin	Kain	Raasch
Anderson, J.	Crossland	Klaver	Raecke
Anderson, L.	Cullingham	Lee	Ryan
Babcock	Dooley	Lusienski	Schultz
Brodahl	Doyle	Mueller	Seaton
Burney	Foster	Norman	Sorrell
Burnham	Heiliger	Ogden	Tvrdik
Carlberg	Hoyt	Peterson	Weborg
Carmody	Hubka	Pizer	Wood
Conklin	Jeffords		

"Voting in the negative, 0.

"Not voting, 5:

Garber	Hern	Mekota	Reavis
Hanna			

"A constitutional majority having voted in the affirmative, the bill was declared passed and the title agreed to."

May 9 Correctly enrolled. Signed by President

"While the Legislature was in session and capable of transacting business, the President signed:

• • • L. B. 388 • • •

May 9 Presented to Governor ..... Page 1445

"STANDING COMMITTEE REPORTS
Enrollment and Review
Presented to Governor

"Presented to the Governor for approval May 9, 1945, at 11:00 A. M.

* * * L. B. 388 * * *

(Signed) Roy B. Carlberg, Chairman."

May 12 Vetoed by Governor ..... Page 1454

"Vetoed After Adjournment

"The following Legislative Bills were vetoed by the Governor after adjournment:

* * *

May 12, 1945

"Legislative Bill 388."

REQUEST FOR ATTORNEY GENERAL'S OPINION

Thirty-Eighth Annual Report of the Nebraska State Railway Commission, 1945

"June 8, 1945.

"Hon. Walter R. Johnson
Attorney General
Capitol Building
Lincoln 9, Nebraska

Dear Sir:

"Your official opinion is requested as to the constitutionality of Legislative Bill 138 enacted by the 58th Session of the Nebraska Legislature, only insofar as it relates to the State Railway Commission.

"In the event you determine that it was legally enacted and is not violative of the state constitution and the statutes pertaining to the State Railway Commission, all and singular of which it is amendatory, then advise officially the full scope and manner of its applicability and the filings thereunder which the Commission will be required to make.

"Advise specifically whether the Commission will be required to file its general orders, resolutions, rules, etc., listed herein, to wit:

"1. RAILROADS: General orders and resolutions and supplements thereto, relating to railroads, which have been issued and adopted intermittently since 1907 and still in full force and effect.

"A. Interpretations of the state constitution and statutes relative to the manner and style of construction of bridges, culverts, crossings (including size and style of warning devices), rules for cooperage of grain, stock and merchandise cars; depots and station facilities, including toilets.

"B. Freight classifications; exceptions thereto; rate tariffs and rules and regulations governing interpretations of said publications. (Now letter size)

"C. Orders of the Commission interpreting state laws relative to crews on train and engines; also safety precautions and measures of employes.

"D. Orders relating to passenger fares, rules and regulations.

"2. STREET RAILWAYS: (Including buses, intra-city). General orders and resolutions and supplements thereto relating to street railways (including buses, intra-city) which have been issued and adopted intermittently since 1907 and still in full force and effect.

"A. Orders relating to passenger rates and fares, rules and regulations, including transfer privileges.

"B. Orders interpreting operative rights, i. e., routes operated.

"C. Transfer privileges and arrangements between different companies.

"D. Orders interpreting state laws relative to fixing employes' wages during strikes.

"3. TELEPHONE COMPANIES: General orders and resolutions and supplements thereto relating to telephone companies which have been issued and adopted intermittently since 1907 and still in full force and effect.

"A. Rate tariffs together with rules of interpretations and regulations. (Uniform size now letter size.)

"B. Rules and regulations relative to construction of wire lines, crossings, conflicts and locations.

"C. Interpretation of state laws with respect to scope of operation. (Invasion of territory.)

"D. Rules of accounting procedure.

"4. EXPRESS COMPANIES: General orders and resolutions, and supplements thereto, relating to Express Companies which have been issued and adopted intermittently since 1907 and still in full force and effect.

"A. Freight classification; exceptions thereto; rate tariffs and rules and regulations governing interpretation of said publications. (Now letter size.)

"5. TELEGRAPH COMPANIES: General orders and resolutions and supplements thereto, relating to Telegraph Companies which have been

issued and adopted intermittently since 1907 and still in full force and effect.

"A. Rate tariffs together with rules of interpretation.

"B. Rules and regulations relating to construction of wire lines, crossings, conflicts and locations.

"6. PULLMAN COMPANIES: General orders and resolutions and supplements thereto relating to Pullman Companies which have been issued and adopted intermittently since 1907 and still in full force and effect.

"A. Rate tariffs together with rules of interpretation.

"7. MOTOR TRUCKS AND AUTOMOBILES, COMMON AND CONTRACT CARRIER: General orders and resolutions, and supplements thereto, relating to Motor Trucks and automobiles, common and contract carriers, which have been issued and adopted intermittently since 1937 and still in full force and effect.

"A. Freight classifications; exceptions thereto; rate tariffs and rules and regulations governing interpretations of said publications. (Now letter size.)

"B. Orders relating to passenger fares, rules and regulations including transfer and interline privileges. (Now letter size.)

"8. ELECTRIC TRANSMISSION LINES: General orders and resolutions, and supplements thereto, which have been issued and adopted intermittently since 1907 and still in full force and effect.

"A. Rules and regulations for wires crossing over and under railroad tracks at public highway crossings, pursuant to the statutes.

"B. Rules, regulations, and recommendations for the construction, operation, and maintenance of overhead and underground electric supply and communication lines other than at public highway crossings of railroad tracks. (National Electric Safety Code, National Bureau of Standards Handbook H32.) (Now in book form size 5 x 7½.)

"9. PUBLIC GRAIN WAREHOUSES: General orders and resolutions and supplements thereto, relating to public grain warehouses which have been issued and adopted intermittently since 1931 and still in full force and effect.

"A. License application forms, bond forms, warehouse receipt forms, rules and regulations in manner of operation.

"B. Prescription of storage rates and interpretations.

"C. Orders fixing fee charged for registering warehouse receipts.

"10. PUBLIC STORAGE WAREHOUSES:

A. Prescribing application, bond, surety, self-insurer and license forms in various orders.

"11. FARM STORAGE OF GRAIN: General orders and regulations and supplements thereto, relative to the Farm Storage of Grain which have been issued and adopted intermittently since 1933 and still in full force and effect.

"A. Rules and regulations.

"B. Prescription of fees.

"12. ISSUANCE OF SECURITIES BY PUBLIC UTILITIES: General orders and resolutions and supplements thereto relating to the issuance of securities by public utilities.

"A. Interpretations of state law as to jurisdiction.

"B. Accounting procedure.

"13. LIQUID FUEL TRACTORS: General orders and resolutions and supplements thereto, relating to Liquid Fuel Tractors which have been issued and adopted intermittently since 1919 and still in full force and effect.

"A. Prescribed form of application for permit.

"B. Prescribed form of application for temporary permit.

"14. PIPE LINE COMPANIES: General orders and resolutions and supplements thereto, relating to Pipe Line Companies which have been issued and adopted intermittently since 1907 and still in full force and effect.

"A. Orders interpreting state laws as to jurisdiction of Commission, manner and type of construction, location, conflict, etc.

"B. Certificates of public convenience and necessity of orders authorizing construction of pipe lines, etc.

"C. Rules for construction of pipe lines and appurtenance equipment, such as pump stations, storage tanks, loading docks, etc.

"D. Orders prescribing rates for the transportation of crude oil and petroleum and products thereof.

"E. Uniform system of accounting for pipe line companies.

"15. Orders of the Commission in multitudinous cases in which the Commission has interpreted and applied the state law to specific controversies.

"Upon passage and approval of Legislative Bill 138, various persons in the State became much concerned.

"We seriously question how the terms of the bill could be applied to the various functions of the Commission.

"The manner in which the State Railway Commission differs from other departments of the State Government was stated by the Nebraska Supreme Court in the case of *State ex rel Quinn v. Marsh,* 141 Neb. 436, 3 N. W. (2nd) 892, wherein it said, among other things:

> "' * * * Among the many important duties this commission is called upon to perform are the following: To regulate rates and services of all common carriers, to investigate violations of law by common carriers, to conduct hearings, to enter orders, to enforce provisions relating to sale of liquid fuel tractor engines in the state, to regulate rates and services and to have general control over pipe lines for oil and gas, to regulate the issuance of stocks and bonds of common carriers, to find the valuation of public service corporations in the state. From an examination of this constitutional and these statutory provisions, it is safe to say that no other agency of the state subordinate to the sovereign government itself has more broad, far-reaching and important powers and functions than does the state railway commission. * * * '

"In re *Lincoln Traction Company v. City of Lincoln, et al.* 103 Neb. 229, the Court, among other things, said:

> "' * * * In adopting the constitutional provision creating the state railway commission it was made an independent part of the Constitution, and was not designated as an amendment

to the executive, legislative or judicial articles of the Constitution. * * * '

"' * * * The functions of this commission are largely administrative, but as it is stated in *Prentis v. Atlantic Coast Line Co.,* supra, the commission necessarily has independent legislative, judicial, and executive or administrative powers. * * * '

"The Legislature recognizing the situation, enacted L. B. 388 which exempted the State Railway Commission from the provisions of L. B. 138, by a vote of 38 Ayes, no Nays, on May 8th, 1945. The Legislature adjourned on May 9th. Governor Griswold vetoed the bill on May 12th, leaving L. B. 138 in full force and effect.

"IT is of the utmost importance and vital concern to the public, and to the Commission, that the questions propounded herein be fully answered.

"Awaiting your early advice, we are

Yours very truly,

Richard H. Larson, Chairman."

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ATTORNEY GENERAL'S OPINION

Thirty-Eighth Annual Report of the
Nebraska State Railway Commission
1945

"STATE OF NEBRASKA
DEPARTMENT OF JUSTICE
LINCOLN
July 16, 1945

"Mr. Richard H. Larson, Chairman
Nebraska State Railway Commission
Capitol Building
Lincoln, Nebraska

Dear Sir:

"You request our official opinion as to the constitutionality of L. B. 138 enacted by the 58th Session of the Legislature, insofar as it relates to the State Railway Commission. In the event we determine that it is a valid and legal act, you ask to be advised officially as to the full scope and manner of its applicability to the Commission and as to the filings thereunder which the Commission will be required to make. You ask to be advised specifically whether the Commission will be required to file its general orders, resolutions, rules, etc., under some fifteen separate headings which you have listed, and which include (1) railroads, (2) street railways, (3) telephone companies, (4) express companies, (5) telegraph companies, (6) Pullman companies, (7) motor trucks and automobiles, common and contract carriers, (8) electric transmission lines, (9) public grain warehouses, (10) public storage warehouses, (11) farm storage of grain, (12) issuance of securities by public utilities, (13) liquid fuel tractors, (14) pipe line companies, and (15) orders of the Commission in multitudinous cases in which the Commission has interpreted and applied the state law to specific controversies.

I.

"We believe that L. B. 138 is a constitutional enactment. Examination of the Legislative Journal of the fifty-eighth session reveals that it was passed in conformity with the constitutional requirements. Furthermore, we find no constitutional limitation on the legislature forbidding it to enact legislation of this kind.

II.

"We believe that the act applies to the State Railway Commission. Sec. 20, Art. IV of the Consti-

tution provides: 'The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law.'

"The constitutional provision creating the Railway Commission contemplates legislative action prescribing the powers and duties of the Commission, and the Legislature has exercised its authority in this respect on frequent occasions. The definition of 'agency' contained in L. B. 138 appears to us to include the Commission, although it specifically excludes the courts and the Legislature. The Commission is primarily an administrative office, although it performs many legislative and judicial functions.

III.

"As to whether or not the State Railway Commission will be required to file its general orders, resolutions, rules, etc., relating to the fifteen specific headings which you list, it is impossible to give you a definite and exact answer, which we can be sure will apply properly to all cases which have arisen or may arise under each of these headings. To attempt to do so, would be to invite certain trouble and embarrassment, and would add to rather than clarify the confusion and uncertainty already existing.

"The decision as to what rules do and what rules do not come within the purview of L. B. 138, is one which must ultimately be made by the Commission itself in the exercise of a sound and reasonable discretion.

"The difficulty, of course, arises from the wide scope and varied nature of the activities of the Commission. The Commission, while essentially an executive and administrative body, performs numerous legislative and judicial functions as well, and it is often difficult to determine whether its rules and orders should be classified as administrative or judicial

and whether they are of general or special application. Your letter emphasizes this difficulty with great force and clarity.

"Nevertheless, we are making a few general observations which we hope the Commission may find helpful in the solution of its problem.

"The answer to your inquiry as to what general orders, rules, resolutions, etc., are to be included under L. B. 138, depends primarily on the interpretation to be placed on the language of the act itself. Sec. 2 of the act defines 'rule' as any 'written statement of any rule, regulation, standard or policy of general application * * * designed to implement, interpret or make specific the law enforced or administered by it, or governing its organization or procedure, but not including regulations concerning the internal management of the agency not affecting private rights or interests.'

"The act requires that certified copies of such rules, printed, typed or mimeographed on legal size paper, shall forthwith be filed in the office of the Secretary of State. The act further requires that such rules shall be published in such manner as the agency shall deem shall best bring them to the attention of the persons affected thereby, and that each agency shall periodically compile and print, type or mimeograph all rules adopted by it and remaining in effect, and copies shall be made available to all interested persons on request, either free or at a price not to exceed cost of publication and mailing. Finally, the act provides that 'no rule shall be effective unless filed with the Secretary of State as herein required.' Such is a summary of the provisions of the act which we deem pertinent to this inquiry.

"Before attempting to interpret the language of this act as it applies to the State Railway Commission, we call attention to certain elementary rules of statutory construction which have been announced

from time to time by our Supreme Court. Perhaps the most fundamental rule is that the legislative intent should be ascertained, if possible, and should be given effect. Hansen v. Dakota County, 135 Neb. 582, 283 N. W. 217. In determining the intent of the Legislature, the statute should be considered as a whole, its object and purposes should be taken into account, and the real intent of the Legislature should prevail over the literal sense of the language used in the statute. State ex rel. Davis v. Farmers State Bank, 112 Neb. 597, 200 N. W. 173; Grand v. Houston, 45 Neb. 813, 64 N. W. 245; Behrens v. State, 140 Neb. 671, 1 N. W. (2d) 289; Anstine v. State, 137 Neb. 148, 288 N. W. 525. The consequences that would result should also be taken into consideration. Howard v. Jensen, 117 Neb. 102, 219 N. W. 811. The strict letter of the law ought not to be followed when such an interpretation would lead to an unreasonable or absurd construction. Parker v. Nothomb, 65 Neb. 315, 93 N. W. 851; In re Glover's Estate, 104 Neb. 151, 175 N. W. 1017. Furthermore, the act should be considered in relation to other enactments of legislature pertaining to the same matters. Nebraska District of Evangelical Lutheran Synod v. McKelvie, 104 Neb. 93, 175 N. W. 531; Morrill v. Bliss, 125 Neb. 97, 249 N. W. 98; McQuiston v. Griffith, 128 Neb. 260, 258 N. W. 553. The fact, however, that a statute may operate harshly in a particular case, does not justify a construction which is contrary to the plain intent of the Legislature. Goble v. Simeral, 67 Neb. 276, 93 N. W. 235; Medow v. Riggert, 132 Neb. 429, 272 N. W. 238.

"Construing L. B. 138 in the light of these principles, it is quite apparent that the legislative intent was to afford to the public and to persons having to do with the various governmental agencies, an opportunity to inspect and obtain copies of the rules and regulations of such agencies, which might affect their private rights and interests. Many of the rules

and regulations of such an agency as the State Railway Commission, for example, have the force and effect of an act of the Legislature itself. It is necessary under our system of government that the public, and particularly those persons whose rights may be affected, be apprised of these rules. Such undoubtedly was the general purpose of the act.

"We must assume, however, that in passing L. B. 138 the Legislature did not intend to limit the powers vested in the Railway Commission by the constitution, or even those powers granted to it by the Legislature itself. For example, the constitution imposes on the Commission the duty to regulate rates of common carriers. The Legislature also has provided a procedure for establishing schedules and classifications of rates (85-302, R. S. 1943) and required the common carriers to print and keep available for public inspection the schedules of rates and fares under which it operates (75-303, 75-304, R. S. 1943). While in a sense such tariff schedules might be said to be rules of general application, we do not believe that they come within the definition as used in the act. Furthermore, there would appear to be nothing gained in the way of informing the public of these rates by filing copies with the Secretary of State in view of the statutory requirements that they be published by the carriers themselves; and it is inconceivable to us that the Legislature should intend that all such tariff regulations should be annulled and abrogated if not filed with the Secretary of State. We are of the opinion, therefore, that such tariff schedules and regulations are not included under L. B. 138.

"Furthermore, the Commission in the eexrcise of its administrative, as well as of its judicial functions and powers, issues numerous orders, regulations, certificates, etc., which, while perhaps following precedent or conforming to a general routine, are intended to apply only to the specific case or matter

before the Commission at the time, and are not a general application. It would be almost physically impossible to compile and type, print or mimeograph all such orders, rules and regulations on legal size paper for filing, or make them available for public distribution. They are not in our opinion, 'of general application', and need not be included.

"To come within the definition of L. B. 138, the rule must be:

"1. Of general application; that is, it must apply to all members of the public coming in its purview;

"2. It must be designed to implement, interpret or make specific the law enforced or administered by the Commission, or governing its organization or procedure.

"Rules of special or local application are to be excluded. So also are all rules and regulations which do not relate to the organization of the Commission or its procedure, and which are not designed to 'implement, interpret or make specific the law enforced or administered by it.' Furthermore, rules and regulations concerning the internal management of the Commission, and which do not affect the private rights and interests of the members of the general public, are not included.

"The Legislature has in the past authorized and empowered the Railway Commission to make and adopt rules and regulations for the government of its activities. Sec. 75-107, R. S. 1943, empowers it 'to make all needful rules and regulations for the government of its proceedings.' Sec. 75-109 also empowers it to 'adopt rules and regulations to govern its proceedings, the mode and manner of conducting investigations and hearings of railroad companies, common carriers, and other persons before it,' etc., Sec. 75-225 authorizes the Commission to establish 'such just and reasonable rules, regulations and require-

ments, to be observed by the (motor) carriers so classified or grouped, as the commission deems necessary or desirable * * *' etc., Sec. 88-213 makes it the duty of the Commission 'to make and promulgate rules and regulations to aid in the administration' of the law governing public grain warehouses, and Sec. 88-302 grants it 'full authority to prescribe such rules and regulations as are deemed necessary to carry out the provisions' of the law governing warehousing of grain on farms. The rules and regulations of general application adopted by the Commission pursuant to any of the above mentioned statutes should, we believe, be included.

"Where reference is made in the rules to standard technical works or tables or other books, tables or documents already in printed form and readily available to the public, or where such books, tables or documents are incorporated by reference into the rules, we do not deem it necessary that such books, tables or documents be printed, typed or mimeographed on legal size paper and filed with the Secretary of State, or indeed, that they be filed in any form. A rule, for example, that certain proceedings before the Commission should be conducted in accordance with 'Robert's Rules of Order', would not require the filing of a copy of 'Robert's Rules of Order' with the Secretary of State.

"Very truly yours,

WALTER R. JOHNSON,

Attorney General,

(Signed) Homer L. Kyle,

HOMER L. KYLE,

Assistant Attorney General."

HISTORY OF L. B. 399, NEBRASKA LEGISLATIVE JOURNAL, FIFTY-EIGHTH SESSION 1947

L. B. 399:

Feb. 3 Read first time ..... Page 263

"BILLS ON FIRST READING

"The following bills were read the first time by title:

• • •

"LEGISLATIVE BILL 399. By Fay Wood of Seward.

"A bill for an act to amend sections 84-901, 84-902, 84-904, 84-905 and 84-906, Revised Statutes Supplement, 1945, relating to rules of administrative agencies; to define terms; to require the filing of properly indexed certified copies of the rules of the administrative agencies; to provide for approval of the rules by the Attorney General; to provide for making of rules and regulations by the Secretary of State to carry out the provisions of this act; to provide the use of and effect as evidence of such certified copies; and to repeal the original sections."

Feb. 5 "BILLS REFERRED TO STANDING COMMITTEE ..... Page 320

"L. B.	Committee
• • •	• • •
399	Judiciary
• • •	• • • "

Feb. 28 "NOTICE OF COMMITTEE HEARINGS ..... Page 564

• • •

Judiciary

L. B. 399 Friday, March 7, 1947 2:00 P. M."

Mar. 20 "STANDING COMMITTEE REPORTS ——— Page 796

Judiciary

• • •

"Legislative Bill 399. Placed on General File as amended.

"Standing Committee amendments to L. B. 399:

"1. Amend section 2, line 9, by striking the word 'and' and inserting in lieu thereof the punctuation ','.

"2. Amend section 2, line 9, by inserting after the word 'indexed' and before the punctuation '.' , the words 'and bear the effective date'.

"3. Amend section 5, line 4, by inserting after the word 'approval' the words 'or disapproval'."

May 7 CONSIDERED. REFERRED FOR REVIEW — Page 1332

"Mr. Wood asked unanimous consent to waive the reading of the bill except the new and stricken matter.

"Consent was granted and it was so ordered.

"Standing Committee amendments found in the Legislative Journal for the Fifty-third Day were adopted.

"Advanced to E and R for review."

May 13 PLACED ON SELECT FILE ——— Page 1391

"STANDING COMMITTEE REPORT

Enrollment and Review

"Placed on Select File as amended.

"E and R amendments to L. B. 399:

"1. In the bill, section 1, strike the comma at the end of the 5th line after 'government' and in the 9th line before 'issued' and show the same as stricken matter.

"2. Section 2, strike the word 'and' in line 16 and in line 17 after *'and'* insert *'(5)'*; line 18, strike the balance of the line after the comma and in lieu thereof insert 'unless *otherwise specifically provided by statute.*'

"3. In the bill, section 6, strike in line 8 the word *'statute'* and in lieu thereof insert *'law.'*

"4. In the bill title, line 7, strike commencing with 'approval' to and including 'General' in line 8, and in lieu thereof insert 'submission of a certified copy of each amendment or rule to the Attorney General for his consideration and approval or disapproval.'

(Signed) Roy B. Carlberg, Chairman."

May 14 CONSIDERED. REFERRED FOR ENGROSSMENT ..... Page 1409

"E and R amendments found in the Legislative Journal for the Eighty-ninth Day were adopted.

"Mr. Wood offered the following amendment, which was adopted by unanimous consent.

"1. Amend page 2 of the bill, section 2, line 11, by inserting after the period following the word 'office' the following:

" 'The Secretary of State, in order to maintain and keep such files current, shall be empowered to require new and amended rules to be filed as complete file pages and to remove all superseded pages to a separate file.'

"Advanced to E and R for engrossment."

May 22 REPLACED ON SELECT FILE ..... Page 1563

"Replaced on Select File as amended.

"E and R amendments to L. B. 399:

"1. In the bill, section 2, line 17, after the word *'State'* insert a semicolon."

May 23 REFERRED FOR ENGROSSMENT....Page 1597

"E and R amendment found in the Legislative Journal for the Ninety-Sixth Day was adopted.

"Advanced to E and R for engrossment."

May 26 CORRECTLY ENGROSSED ..... Page 1614

"* * *

Legislative Bill 399. Correctly engrossed.
* * * "

May 28 FINAL READING ..... Page 1673

"A bill for an act to amend sections 84-901, 84-902, 84-904, 84-905 and 84-906, Revised Statutes Supplement, 1945, relating to rules of administrative agencies; to define terms; to require the filing of properly indexed certified copies of the rules of the administrative agencies; to provide for submission of a certified copy of each amendment to rule to the Attorney General for his consideration and approval or disapproval; to provide for making of rules and regulations by the Secretary of State to carry out the provisions of this act; to provide the use of and effect as evidence of such certified copies; and to repeal the original sections.

"Whereupon the President stated: 'All provisions of law relative to procedure having been complied with, the question is, "Shall the bill pass?" '

"Voting in the affirmative, 38:

Adams	Doyle	Lusienski	Prohs
Babcock	Foster	McKnight	Raasch
Benesch	Garber	Metzger	Raecke
Bevins	Heiliger	Mueller	Schroeder
Burney	Hern	Norman	Seaton
Burnham	Hoyt	Person	Tvrdik
Callan	Kain	Peterson	Vogel
Carmody	Kosman	Pizer	Weborg
Cramer	Lee	Prichard	Wood
Cretsinger	Lillibridge		

"Voting in the negative, 0.

"Not voting, 5:

Anderson	Copeland	Leedom	Steele
Carlberg			

"A constitutional majority having voted in the affirmative, the bill was declared passed and the title agreed to."

June 2 CORRECTLY ENROLLED .... Page 1685

SIGNED BY PRESIDENT

"President Signs

"While the Legislature was in session and capable of transacting business, the President signed:

* * * L. B. 399 * * * ."

June 3 PRESENTED TO GOVERNOR ..... Page 1709

"STANDING COMMITTEE REPORTS"

Enrollment and Review
Presented to the Governor

"Presented to the Governor for approval on June 3, 1947, at 9:00 a. m.

* * * L. B. 399 * * *

June 9 APPROVED BY GOVERNOR ..... — Page 1790

"LEGISLATIVE BILLS

Approved After Adjournment

"The following Legislative Bills were approved by the Governor after adjournment:

June 9, 1947

* * * Legislative Bill 399 * * * ."

—o—

TEXT OF L. B. 399, 1947
SESSION LAWS OF 1947

"ADMINISTRATIVE STATE AGENCIES
AMENDMENT TO THEIR RULES
CONSIDERATION BY ATTORNEY GENERAL

(84-901, 902, 904, 905, 906, R. S. Supp. '45)

LEGISLATIVE BILL NO. 399, SERIAL NO. 319

"A BILL FOR AN ACT to amend sections 84-901, 84-902, 84-904, 84-905 and 84-906, Revised Statutes Supplement, 1945, relating to rules of administrative agencies; to define terms; to require the filing of properly indexed certified copies of the rules of the administrative agencies; to provide for submission of a certified copy of each amendment or rule to the Attorney General for his consideration and approval or disapproval; to provide for making rules and regulations by the Secretary of State to carry out the provisions of this act; to provide the use of and effect as evidence of such certified copies; and to repeal the original sections.

"Introduced by Fay Wood of Seward.

"Be it enacted by the people of the State of Nebraska.

"Section 1. That section 84-901, Revised Statutes Supplement, 1945, be amended to read as follows:

"84-901. For the purposes of this act: (1) 'Agency' means each board, commission, department, officer, division or other administrative office or unit of the state government authorized by law to make rules, except the courts and the Legislature; (2) 'rule' means written statement of any rule, regulation, standard or policy of general application issued by an agency, including the amendment or repeal thereof, and designed to implement, interpret or make specific the law enforced or administered by it, or governing its organization or procedure, but not including regulations concerning the internal management of the agency not affecting private rights or interests; Provided, that for the purpose of this act every rule which shall prescribe a penalty shall be presumed to have general applicability or to affect private rights and interests.

"Sec. 2. That section 84-902, Revised Statutes Supplement, 1945, be amended to read as follows:

"84-902. Each agency shall file forthwith in the office of the Secretary of State a certified copy of the rules in force and effect in such agency on the effective date of this act. A certified copy of any rule adopted after the effective date of this act shall likewise be so filed. Such copy or copies shall be printed, typed or mimeographed on legal size paper, properly indexed and bear the effective date. The Secretary of State shall keep a permanent file of all such rules, which shall be open to public inspection during regular business hours of his office. The Secretary of State, in order to maintain and keep such files current, shall be empowered to require new and amended rules to be filed as complete file pages and to remove all superseded pages to a separate file. The Secretary of State shall prescribe regula-

tions for carrying out the provisions of this act to include: (1) Manner of certification of rules filed under this act; (2) form of indexing the file of each agency; (3) method of filing amendments to the rules; (4) manner in which copies shall be made available to the public from the office of the Secretary of State; and (5) the price per copy, unless otherwise specifically provided by statute.

"Sec. 3. That section 84-904, Revised Statutes Supplement, 1945, be amended to read as follows:

"84-904. Each agency shall file with the Clerk of the Legislature, not more than thirty nor less than ten days prior to the commencement of each regular legislative session, a certified copy of the rules of the agency in force and effect at the time of filing, properly indexed in the manner prescribed for filing with the Secretary of State, for the consideration of the Legislature.

"Sec. 4. That section 84-905, Revised Statutes Supplement, 1945, be amended to read as follows:

"84-905. Each agency shall prepare, compile and print, type or mimeograph a complete certified compilation of all rules duly adopted and in force and effect on the thirteenth day prior to the commencement of the next regular legislative session, and on the same date prior to each regular legislative session thereafter, and shall file same in the office of the Secretary of State, as provided by section 84-902. Such certified compilation, when duly filed, shall supersede all rules previously filed. This shall not be construed as precluding any such agency from making additional compilations as often as it deems it necessary or advisable. Copies shall be made available to all interested persons on request, at a price fixed to cover costs of publication and mailing; Provided, any such agency may furnish the same without the same charge, in the discretion of the agency, if funds are available.

"Sec. 5. The certified copy of each amendment or rule adopted under this act, subsequent to the effective date thereof, shall be submitted to the Attorney General for his consideration, and his approval or disapproval thereof shall be attached to and filed with such amendment or rule in the office of the Secretary of State. Thirty days prior to the next regular legislative session, the Attorney General shall have examined the file of each agency as it appears in the office of the Secretary of State, and shall approve same or file a report with the Clerk of the Legislature in the form of an opinion on each rule which in his opinion fails to meet the requirements of the Constitution and laws of the United States and the State of Nebraska.

"Sec. 6. That section 84-906, Revised Statutes Supplement, 1945, be amended to read as follows:

"84-906. No rule required under this act to be filed with the Secretary of State shall be valid as against any person until the certified copy of the rule shall have been so filed; and, unless otherwise specifically provided by law, such filing of any rule shall, except where notice by publication is insufficient in law, be sufficient to give notice of the contents of such rule to any person subject thereto or affected thereby. The filing of any rule as herein provided shall give rise to a rebuttable presumption that it was duly and legally adopted.

"Sec. 7. That original sections 84-901, 84-902, 84-904, 84-905 and 84-906, Revised Statutes Supplement, 1945, are repealed.

"Approved June 9, 1947."

HISTORY OF L. B. 241, NEBRASKA LEGISLATIVE JOURNAL SIXTY-SECOND SESSION 1951

(From Daily Journal—Printed Legislative Journal not yet Available)

L. B. 241:

Jan. 23 Read first time ..... Page 211

"BILLS ON FIRST READING

"The following bills were read the first time by title:

* * *

"LEGISLATIVE BILL 241. By John P. McKnight of Nemaha and Earl J. Lee of Dodge.

"A bill for an act to amend section 84-901, Reissue Revised Statutes of Nebraska, 1943, relating to state government; to eliminate the State Railway Commission from the provisions requiring each state agency to file a copy of administrative rules with the Secretary of State; and to repeal the original section."

Jan. 23 "BILLS REFERRED TO STANDING COMMITTEE ..... Page 214

"L. B.	Committee
* * *	* * *
241	Committee on Government
* * *	* * *"

Feb. 23 "NOTICE OF COMMITTEE HEARINGS ..... Page 571

* * *

Committee on Government

L. B. 241 Wednesday, February 28, 1951 2:00 p. m."

Feb. 28 "STANDING COMMITTEE REPORTS ..... Committee Minutes

Committee on Government

"The committee on Government considered L. B. 241, and Senator Klaver moved to indefinitely postpone the Bill. The motion was seconded by Senator Kreutz, and the vote to indefinitely postpone L. B. 241 was unanimously carried.

(Signed) Karl E. Vogel, Chairman
Eloise M. Galloway, Clerk."

Mar. 7 GOVERNMENT COMMITTEE REPORT ..... Committee Minutes

"L. B. 241 was recalled at the request of Senator Vogel, Chairman of the Committee, was then considered, and Senator Klaver moved to advance the bill to general file. Senator Nelson seconded the motion, and the committee, by unanimous vote, advanced the bill to general file."

Mar. 8 "STANDING COMMITTEE REPORTS ..... Page 796

Government

Committee Statement on L. B. 241

March 7, 1951

"This bill as originally presented would have exempted the Railway Commission from the provisions of the statutes requiring them to file a copy of all their administrative rules, including tariffs and rules for their interpretation, with the Secretary of State, a privilege now enjoyed by only the courts and the legislature.

"The committee understands that a similar bill was passed by the Legislature in 1945, which was ve-

toed by the Governor, for the reason, as he stated, that this agency is no different than any other similar state agency and should be treated accordingly. The committee agrees with this statement, except that they can see no reason why the Railway Commission tariffs together with rules for their interpretation should be filed with the Secretary of State. They are of a voluminous nature and their filing with the Secretary of State requires a great deal of labor. The Department of State is not sufficiently informed as to their interpretation when inquiry is made of them and must of necessity refer the person making the inquiry back to the Railway Commission.

"Moreover, the committee is informed that the Railway Commission has not conformed with this requirement, has not in the past filed their tariffs with the Secretary of State and that there are suits now pending based on the premise that the tariffs are not legal, since they were not so filed.

"The bill was supported at the public hearing only by Mr. Larson of the Railway Commission and no one appeared in opposition. The Secretary of State, upon inquiry made in his office, voiced no opposition to the bill, as amended.

"The committee, at its executive meeting on March 7, amended the bill, so that it will no longer require the filing of the tariff, but will still require the Railway Commission to file all other information with the Secretary of State, as is required by law of all other agencies and the committee, by unanimous vote of its 9 members, advanced the amended bill to General File.

Karl E. Vogel, Chairman."

"Standing Committee Amendments to L. B. 241:

"Amend page 2 of the bill, section 1, line 7 by striking the new matter, and in line 14 by inserting after the word 'interests' the following: ', and not

including rate tariffs, together with rules of interpretation thereof'.

"Amend the title of the bill by striking lines 4 and 6 and inserting in lieu thereof the following: 'redefine terms; to except rate tariffs, together with rules of interpretation thereof, from requirements of sections 84-901 to 84-906, Re-issue Revised Statutes of Nebraska, 1943;'."

Mar. 8 Placed on general file as amended ..... Page 729

Mar. 21 Read and considered. Standing Committee amendments adopted and advanced to E & R for review ..... Page 890

Mar. 28 Placed on Select File as amended ..... Page 931

Mar. 29 E & R amendments adopted. Advanced to E & R for engrossment ..... Page 947

Mar. 30 Correctly engrossed ..... Page 971

Apr. 4 Laid over ..... Page 1016

Apr. 5 Read and passed with 38 ayes, no nays, and 5 not voting ..... Page 1025

Apr. 6 Correctly enrolled ..... Page 1049

Apr. 6 Signed by the Speaker ..... Page 1049

Apr. 9 Presented to the Governor for approval on April 9, 1951, at 10:20 A. M. ..... Page 1060

Apr. 13 Approved by the Governor on April 12, 1951 ..... Page 1124

—o—

TEXT OF L. B. 241, 1951
SESSION LAWS OF 1951

"STATE GOVERNMENT
REDEFINING TERMS
(84-901 R. R. S. 1943)

L. B. No. 241 Serial No. 200

"A BILL FOR AN ACT to amend section 84-901, Reissue Revised Statutes of Nebraska, 1943, relating to state government; to redefine terms; to except rate tariffs, and any rules of interpretation thereof, from requirements of sections 84-901 to 84-906, Reissue Revised Statutes of Nebraska, 1943; and to repeal the original section.

"Introduced by John P. McKnight of Nemaha, Earl J. Lee of Dodge.

"Be it enacted by the people of the State of Nebraska,

"Section 1. That section 84-901, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

"84-901. For the purposes of sections 84-901 to 84-906: (1) 'Agency' means each board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules, except the courts and the Legislature; (2) 'rule' means the written statement of any rule, regulation, standard or policy of general application issued by an agency, including the amendment or repeal thereof, and designed to implement, interpret, or make specific the law enforced or administered by it, or governing its organization or procedure, but not including regulations concerning the internal management of the agency not affecting private rights or interests, and not including rate tariffs, and any rules of interpretation thereof; Provided, that for the purpose of this act every rule which shall prescribe a penalty shall be presumed to have general applicability or to affect private rights and interests.

"Sec. 2. That original section 84-901, Reissue Revised Statutes of Nebraska, 1943, is repealed.

"Approved, April 12, 1951."

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Supreme Court of the United States

o———o———o

OCTOBER TERM, 1951

o———o———o

No. 350

o———o———o

JOSEPH MOGIS,

Petitioner,

vs.

LYMAN-RICHEY SAND & GRAVEL CORPORATION, a Corporation,

Respondent.

o———o———o

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

o———o———o

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION

o———o———o

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 33) is reported at 189 F. (2d) 130 and the denial of rehearing (R. 95) appears at 190 F.

(2d) 202 affirming the opinion of the United States District Court for the District of Nebraska (R. 12) which appears at 90 F. Supp. 251.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court to review the decision of the Circuit Court of Appeals for the Eighth Circuit under the provisions of Title 28, U. S. C. 1254 (1).

REASONS WHY CERTIORARI SHOULD BE DENIED

1. The plaintiff truckers, nine in number, hauled sand and gravel for the defendant over a period of nearly four years without any protest or objection as to the amounts which they were being paid for the service. They did not request that they be paid the rate specified by the Motor Vehicle Tariff under consideration, but rather were content at the times of the various deliveries to receive the amounts actually paid by defendant. (See Judge Delehant's decision, R. top of page 36). There is no allegation in the complaint that the plaintiffs received these amounts under protest or that they ever objected that they were not being paid the rate called for by the Nebraska Railway Commision regulation. (See Complaint, R. page 2.) If the payments made by the defendant were not as per Commission regulations the plaintiffs in receiving them violated the regulation just as much as did the defendant in making them.

2. After four years of hauling for the defendant it was conceived by Mogis and the eight truckers who have assigned their claims to him that substantial additional compensation could be collected from defendant in the

guise of under-charges, and on September 15, 1949 (R. p. 5), this suit was instituted to collect an alleged undercharge on every truck load of gravel that had been hauled by these truckers between September 15, 1945, and April 5, 1949. The amounts claimed for the various assignors range from $3,000 to $10,000 and multiplied by three, total $138,000.00. It is the purpose of this lawsuit to collect this amount from defendant in addition to the amounts which plaintiffs were perfectly satisfied to receive at the time the services were rendered.

3. The theory upon which the plaintiffs would have this Court review the decisions of the District Court of the District of Nebraska and the Circuit Court of Appeals of the Eighth Circuit is that those Courts, particularly the last named Court, should have waited for some decision of the Supreme Court of Nebraska construing the statute in controversy. The argument ignores the fact that it was within the power of the plaintiffs in the first instance to secure a ruling by the Supreme Court of Nebraska on this question. The plaintiffs could have started their case in the state court. The principal office of the defendant is in Omaha, Nebraska, and its business is largely transacted in Nebraska. All of the hauling involved in this case was done in Nebraska (R. pp. 2 and 5, Complaint). Plaintiffs themselves are residents of Nebraska (R. p. 5). Instead plaintiffs elected to bring this case in the Federal Court, and there never was any suggestion by them that the decision should await an interpretation by the Nebraska Courts of the statute upon which their case depended, until after the Court in which they had brought the case had ruled against them. Then the plaintiffs, in an effort to by-pass the decision of the Federal District Court, started a de-

claratory judgment action in the District Court of Lancaster County, Nebraska, in which they asked the Court to construe the statute in question. The decision of the United States District Court was rendered on June 1, 1950 (R. 17). The declaratory judgment action was filed August 16, 1950 (R. 23). It was brought by the same attorneys who filed the instant case (R. 25), and it was filed in the name of one Albert Tady, who is one of the assignors of the plaintiff herein (R. 24). There is no showing in the record in this case, nor in plaintiffs' brief that this action has ever progressed beyond the filing stage, and, as a matter of fact, it has not. In fact, the plaintiffs refer to it in their brief filed herein in support of their application for certiorari as an "action now pending before the District Court of Lancaster County." (Plaintiffs' brief, p. 16.)

4. The plaintiffs well knew when they elected to start this case in the Federal Court that the validity of the regulation of the Nebraska State Railway Commission upon which they rely depended upon whether or not it should have been filed with the Secretary of State as per the Nebraska statute. In Paragraph III of the Complaint (R. 3) the plaintiffs allege that—

> "The transportation of sand, gravel, crushed stone and similar materials in commerce by motor carriers within the State of Nebraska, including the rates to be charged therefor, is subject to and is governed by the regulations of the Nebraska State Railway Commission * * *."

Note that the plaintiffs themselves describe the rate schedules under consideration as "regulations" of the Railway Commission. The plaintiffs knew, or are charged with knowing, that the Nebraska statute, Section 84-901,

Revised Statutes Nebraska 1943, required the Nebraska State Railway Commission, along with other administrative agencies, to file with the Secretary of State a copy of the "rules in force and effect," and defined the word "rule' as meaning—

> "The written statement of any rule, *regulation*, standard or policy of general application issued by an agency."

They further knew that by the terms of this statute no rule or regulation would be valid or enforcible unless so filed. They knew, of course, that the rate regulation upon which they were depending had never been filed with the Secretary of State, and they must have known that the question as to whether or not it should have been so filed would have to be passed upon and decided by the Court in which they elected to bring their case. That Court having decided the question, their remedy was to appeal (which they did), and not to start an action in the state court in an effort to avoid the effect of the decision. They are in no position now to claim that the Circuit Court of Appeals should have awaited a decision in the state court case, filed in the hope that they might get a state court ruling contrary to the decision of the Federal Court in which they brought their action. Especially is this true in a situation where the applicants concede that there is no other state court action pending in which the question here raised is involved except the one which they themselves have started, which action they must confess has not yet even been heard in the trial court, although it has been pending for more than a year. They would have this Court nullify the decision of the United States District Court and the United States Circuit Court of Appeals and send this case back to the District Court, there to await the possibility that the

Supreme Court of Nebraska may ultimately reach some different interpretation of the statute than that arrived at by two Federal Courts and this notwithstanding the fact that Judge Donohoe, who rendered the decision in the District Court, and Judge Delehant, who wrote the opinion in the Circuit Court of Appeals, are both Nebraska Judges and as capable of construing a Nebraska statute as any Judges of the Supreme Court of Nebraska.

5. While conceding that no Nebraska Court has ever passed upon the question as to whether rate regulations of the Railway Commission must be filed with the Secretary of State, the plaintiffs would have this Honorable Court entertain this case on the theory that the Courts below should have been ruled and controlled by (a) a Bar Association Committee Report (which incidentally is not shown to have had anything to do with the passage of the statute in controversy, although Judge Donohoe did mention it), (b) an opinion of the Attorney General, (c) some subsequently enacted legislation and Committee proceedings in connection therewith, and (d) the fact that the Nebraska Railway Commission has not filed rate regulations with the Secretary of State, thereby presumably indicating its administrative opinion that it was not obliged to do so.

In the first place, neither the Report of the Bar Association Committee, nor the Attorney General's opinion, nor the legislative proceedings referred to, are a part of the record in this case. They were brought to the Court's attention only through the medium of briefs filed by the plaintiff and are brought to this Court's attention only in the form of an "Appendix to Petition for Certiorari and Brief in Support Thereof." They are not

identified in any way as being a part of the record. That being so we do not know how the petitioners can ask this Court to review the case on the theory that the Court below did not give sufficient consideration to these documents. But the Circuit Court of Appeals, and the District Court to some extent, notwithstanding the absence of these documents from the record, indulged the plaintiffs by considering plaintiffs' arguments in connection therewith.

6. The record shows (a) that the trial Court considered that the context of the Bar Association Committee Report demonstrates that the Committee felt that "rates" were "rules" within the meaning of the latter term as used in the statute; and that therefore they should be filed with the Secretary of State (R. 14, 15), and (b) that the legislative history of this and subsequent acts indicated no legislative intention contrary to the conclusion reached by the Court (R. 14). The trial Court also considered the opinion of the Attorney General and found it not impressive (R. 15, 16). Likewise the Appellate Court considered the argument with reference to legislative history (R. 45, 48), and the Bar Committee Report (R. 49, 50), and was unable to read into those records the conclusions for which plaintiffs contend. The Circuit Court of Appeals likewise considered and discussed the opinion of the Attorney General upon which the applicants rely, and was unable to place upon it the construction contended for by the plaintiffs (R. 51). There is not here a situation wherein the Court ignored or failed to give substantial consideration to administrative acts and opinions which might throw light upon the interpretation to be given a statute. On the contrary both Courts gave substantial weight and respectful con-

sideration to these matters (R. 51), but could not arrive at the interpretation contended for by plaintiffs. In the prevailing opinion of the Circuit Court of Appeals not only were these matters given consideration separately but they were considered collectively (R. 50-57), including a thorough discussion of the things done and not done by the Legislature subsequent to the passage of the act in controversy, and Judge Delehant concluded by saying that—

> "Appraised in their aggregate effect, the conflicting considerations examined lead us to the conclusion that the district court's opinion respecting the meaning of the Nebraska law applicable during the interval involved represents an allowable and reasonable, although admittedly not the inevitable, view supported by authority and by accepted principles of statutory construction. More directly to the point, we are not convinced that the trial court was in error in its ruling."

7. What the petitioner is asking this Honorable Court to do is to take jurisdiction of the case for the purpose of ultimately holding that the Court to which plaintiffs submitted their case for decision should have refrained from deciding it until some State Court has passed upon the issue involved. Either that or that the Court to which they submitted their case did not give sufficient consideration to the interpretation placed upon the statute by others (not courts) and therefore did not properly interpret the statute—no question of the constitutionality of the statute being involved. We submit that there is no Federal question in this situation and that petitioners have no precedent for their request that the Supreme Court of the United States review the interpretation placed upon a state statute by the District Court and the Circuit Court of Appeals in the same case,

the opinion in both instances being by Federal Judges from the state whose statute is involved.

8. The petitioners would have this Honorable Court accept jurisdiction on the theory that much confusion has resulted from this decision and that the decision—

> "places in jeopardy all of the rates adopted by the state administrative agency authorized by state constitution and statutes to regulate all the public utilities and common carriers within the state." (Petitioner's brief, p. 26.)

There is no showing either in the record, the brief or in the appendix thereto that any such result has happened, or is apt to happen. No railroad, no telephone company, no power company, no utility of any kind ever intervened in this case or filed a brief amicus curiae, or ever evidenced any interest whatsoever in the case. If their tariffs had been in danger we may be sure that they would have appeared in the case in some capacity. Before the petitioners are entitled to ask the Honorable Court to consider the case on the theory that matters of vital public importance are involved or that substantial property interests are in jeopardy, the plaintiffs should present some evidence to the Court that such is the fact. This plaintiff has not done. The decision will affect only the haulers and the company here involved.

9. The next and last reason, as we interpret the brief, advanced by petitioners as grounds for the issuance of the writ, is that the decision is in conflict with two Seventh Circuit cases.

One of the cases which Petitioners cite, *Yellow Cab Co. v. City of Chicago,* 186 Fed. (2d) 94, was a case which involved a question of purely local law on which

the Illinois Court had not had an opportunity to pass. We have already pointed out that the plaintiffs herein could have given the Nebraska Court an opportunity to pass on the question involved by starting the case in the state court. We don't think the Yellow Cab case applies to situations where, as here, the plaintiff having lost in the Federal Court below starts a case in the state court in the hope that he can get a different statutory interpretation in that court, and then asks the Federal Court to stay proceedings on the chance that the state court may arrive at a conclusion different from that reached by the Federal Court.

In the other case, *United States v. 150.29 Acres of Land,* 135 Fed. (2d) 878, the Court said, to quote from petitioner's excerpt—

> "We hesitate to intrude ourselves into a situation that requires us to make a decision as to what the law of Wisconsin is, when we are unable to discern with assurance what that law is."

The Court went on to say that—

> "Since we are in doubt as to what the law of Wisconsin is on that point, we think it advisable to remand the case to the District Court."

Neither the United States District Court for Nebraska nor the Circuit Court of Appeals of the Eighth Circuit found itself in the position of being unable to discern with assurance what the Nebraska statute meant, nor were they in doubt as to how it should be construed. Both Courts gave the question great consideration and both came up with the same answer. So thoroughly did they analyze the question that there is little likelihood that the Supreme Court of Nebraska would reach a different conclusion. We cannot see any conflict between the

Seventh Circuit and the Eighth Circuit on any question here involved. And we cannot see how the judicial process would be in any way served by an order of this Court which would have the effect of holding in abeyance or, indeed, nullify a judgment already entered by the Circuit Court of Appeals for a year or a year and a half while the petitioners, in some action not yet even tried in the trial Court, experiment to see whether or not the Supreme Court of Nebraska will ultimately reach a conclusion different from that arrived at by two Federal Courts.

Petitioner's brief proceeds upon the theory that in every case where the construction of a state statute is involved it is the duty of the Federal Court to stand by until the court of last resort of the state has construed the statute. That, of course, is not the law. As stated in *Meredith v. Winter Haven,* 320 U. S. 228, 64 S. Ct. 7:

> "It has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment."

See also *Driscoll v. Edison Light & Power Co.,* 307 U. S. 104, 59 S. C. 715, 83 L. Ed. 1134; rehearing denied, 307 U. S. 650, 59 S. C. 831, 83 L. Ed. 1529; *Wilson v. Masengill,* 124 Fed. (2d) 666, certiorari denied 316 U. S. 686, 62 S. C. 1274, 86 L. Ed. 1758; *Magnolia Petroleum Co. v. Thompson,* 106 Fed. (2d) 217, certiorari denied 308 U. S. 613, 60 S. C. 180, 84 L. Ed. 513.

If Petitioner's theory is correct then Petitioner immediately after filing this case in the District Court for the District of Nebraska, should have asked for a stay pending a state court decision. No such request was filed. Instead Petitioner was content to submit the ques-

tion to the District Court and had no fault to find with the federal jurisdiction until the District Court had rendered a decision adverse to Petitioner's claims.

First Petitioner appealed and then attempted to raise the same issue in a declaratory judgment action filed in the state court, and then tried to get the Circuit Court of Appeals to postpone the hearing pending some decision in the declaratory judgment action. Petitioner includes in the record brought to this Court his "Motion of Appellant for Extension of Time to File Brief and to Delay Hearing of Appeal" (R. 22), but does not include the showing in opposition filed by the appellee. That such a showing was filed appears in the "Order Denying Motion of Appellant to Delay Hearing of Appeal" (R. 32).

The Court denied the motion (R. 32) and the Petitioner then abandoned the contention that it was the duty of the Circuit Court of Appeals to stand by until the state court had interpreted the statute, and proceeded to submit the case to the Circuit Court of Appeals solely upon the question as to whether or not rate tariffs prescribed by the Commission were to be included within the meaning of the word "rules" as that term appears and is defined in the Nebraska statute, and whether the failure of the Nebraska Railway Commission to file with the Secretary of State the rate tariffs upon which plaintiff relies rendered the same invalid (see Judge Delehant's opinion, R. 33-37).

Having again received a decision adverse to his interpretation of the statute Petitioner made the point in a Petition for Rehearing that the Court should have remanded the cause to the District Court with directions

to retain the complaint until the question of interpretation of the statute "shall have been decided by the Courts of the State of Nebraska" (R. 71, 72). Thus throughout this case it has been Petitioner's strategy first to find out how the Federal Court would decide the question and then, being dissatisfied, to insist that the Federal Court should not have ruled on the question at all.

The Circuit Court of Appeals in a Per Curiam opinion (R. 95) overruled the Motion for Rehearing on the ground that the case was purely one at law seeking a personal judgment for money, that it was not one of those exceptional cases where, after the case has been tried below, the Court of Appeals will mark time pending some decision in the state court, and that the Court had no power to suspend or stay decisions already rendered. The Court also indicated some puzzlement as to in what form or upon what terms the Court could make such an order (R. 97).

The Petitioner has cited a number of cases to the point that where the construction of a state statute is involved the decision should be referred by the Federal Courts to the state courts. The law is not so sweeping and the decisions are not so broad in their scope. The true rule is, particularly where the plaintiff submits a case to the Federal Court which requires the Court to make a decision on the basis of what it believes the law to be in the state or what it believes the state highest court will ultimately and authoritatively declare the law to be, that the Federal Court will decide the question of the state law for itself. *Maryland Casualty Co. v. Cassetty,* 119 Fed. (2d) 602; *New England Mutual Life Insurance Co.*

v. Mitchell, 118 Fed. (2d) 414, certiorari denied 62 S. C. 60, 314 U. S. 629, 86 L. Ed. 505; *Delong v. Jefferson Standard Life Ins. Co.,* 109 Fed. (2d) 585, certiorari denied 310 U. S. 635, 60 S. C. 1081, 84 L. Ed. 1405; *Malloy v. New York Life Ins. Co.,* 103 Fed. (2d) 439, certiorari 308 U. S. 572, 60 S. Ct. 86, 84 L. Ed. 480; *Propper v. Clark,* 337 U. S. 472, 69 S. Ct. 1333, 93 L. Ed. 436; *Chicago, etc., Coal Co. v. Herr,* 127 Fed. (2d) 1010, certiorari denied 317 U. S. 669, 63 S. Ct. 74. Of course, the Federal Court need not engage in mere speculation as to how the state court would decide the question but, as pointed out above, neither Federal Court that passed on this case found it necessary to engage in speculation. Both of them came to the same conclusion.

A Federal Court may decide for itself the proper construction of a state statute and indeed it is the duty of a Federal Court to construe a state statute, not already construed by the state court, where it becomes necessary in the case before it. *Portneuf-Marsh Valley Canal Co. v. Brown,* 274 U. S. 630, 47 S. C. 692, 71 L. Ed. 1243; *Stone v. Interstate, etc., Co.,* 103 Fed. (2d) 544, 308 U. S. 522, 60 S. Ct. 292, 84 L. Ed. 442; *In re Boswell,* 96 Fed. (2d) 239; *Cromwell v. Hillsborough Twp.,* 149 F. (2d) 617, affd. 326 U. S. 620, 66 S. Ct. 445; *Baywell v. Springfield, etc., Co.,* 144 F. (2d) 65, cert. den. 323 U. S. 735, 65 S. Ct. 72; *Barnes v. Retail, etc., Assn.,* 125 F. (2d) 645.

We have here a case that was instituted by Petitioner in the Federal District Court and carried through to a conclusion in the Circuit Court of Appeals and two Nebraska Judges have said that the tariff under which Petitioner seeks recovery is invalid because it was not filed with the Secretary of State as per statute. How

will the judicial processes be served by setting aside everything that has been done on the theory that possibly the Judges of the Supreme Court of Nebraska, in a case which has not yet even been heard in the trial Court, will come to different conclusions.

In the Meredith case, supra, this Court said:

> "To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstance which would warrant a refusal to exercise it."

Paraphrasing the above, to remit the parties to the state courts in this case is to delay further the disposition of litigation which has been pending for more than three years and which has already been decided by the District Court and the Circuit Court of Appeals. It is to favor—not penalize—the parties who selected the jurisdiction in which they wished to try their lawsuit and who would now like to have it decided in some other jurisdiction.

Respectfully submitted,

YALE C. HOLLAND,
LEO EISENSTATT,
Attorneys for Respondent.